84-1314

No. .....

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 846, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 970, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1248, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

HAMPTON ROADS SHIPPING ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. After a union has voluntarily submitted its grievance to arbitration in accordance with its collective bargaining agreement and has prevailed at the arbitration, does this Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970), permit a district court to issue an injunction against work stoppages to enforce the award pending judicial review, despite the provisions of § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104?

2. Does a district court have jurisdiction to restrain a work stoppage aimed at enforcing an arbitration award, where the collective bargaining agreement reserves to the union the right to strike to enforce the award and specifically makes inapplicable the provisions of any no strike clause?

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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 846, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 970, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1248, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, International Longshoremen's Association, AFL-CIO (ILA), and its Locals 846, 970, and 1248, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on October 23, 1984.

Opinions Below

The opinion of the court of appeals is reported at 746 F.2d 1015 and is reproduced as Appendix A to this petition (1a-7a). The opinion of the district court, which is

not reported, is reproduced as Appendix B to this petition. (8a-29a).

Jurisdiction

The judgment of the court of appeals was entered on October 23, 1984. Appendix C at 30a. A timely petition for rehearing was denied on November 20, 1984. Appendix D at 31a. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Statute Involved

The relevant statutory provision is § 4(a) of the Norris-LaGuardia Act, 29 U.S.C. § 104(a).

> § 104. Acts not subject to restraining orders or injunctions
>
> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;

Statement of the Case

In early August 1984, Petitioner ILA and its locals on the East and Gulf Coasts, engaged in a series of work stoppages aimed at enforcing an arbitration award.[1] This

[1] Work stoppages to enforce the award occurred in Norfolk, Virginia, Wilmington, North Carolina, Charleston, South Carolina, Savannah, Georgia, Miami, Florida, and Houston, Texas.

case presents for review a decision of the Court of Appeals for the Fourth Circuit which, despite an express provision in the collective bargaining agreement abrogating any no strike clause, affirmed the issuance of a preliminary injunction to restrain a union from work stoppages to enforce the award in its favor. In identical circumstances, the Fifth Circuit reversed and vacated a similar injunction.[2]

The Master Contract[3] between the ILA, and the multi-employer bargaining group representing management associations in 36 Atlantic and Gulf Coast Ports provides for the arbitration of disputes concerning its Containerization Agreements.[4] "All cases" relating to the Containerization Agreement are to be decided, either initially or after the completion of local grievance procedures, by a joint-labor management committee, known as the Management-ILA Emergency Hearing Panel (EHP). The Panel is composed of an equal number of management and labor representatives and is governed by majority rule. A deadlock results

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[2] *West Gulf Maritime Ass'n* v. *ILA Deep Sea Local 24, etc.*, No. 84-2442 (5th Cir. Jan. 7, 1985), *reh'g denied*, Feb. 7, 1985. The Fifth Circuit's decision is not yet reported. A copy of the slip opinion appears as Appendix E to this petition.

[3] In the longshore industry, collective bargaining is conducted on a coastwide basis as to 7 "Master Contract" issues, including containerization. All other terms and conditions of employment are negotiated on a local basis.

[4] The Court is familiar with the importance to the longshore industry of collectively bargained efforts to deal with the technological revolution known as containerization. *See NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980). *See also American Trucking Ass'ns, Inc.* v. *NLRB*, 734 F.2d 966 (4th Cir. 1984), *reh'g denied*, July 31, 1984, *cert. granted*, Jan. 21, 1985. In an effort to ameliorate job displacement while implementing the new technology, management and the ILA have adopted not only the Rules on Containers, which are now before the Court, but also the Containerization Agreement. The latter establishes the working conditions governing the loading and unloading of containers on and off vessels, as distinct from the loading and unloading of cargo into and out of containers, which are covered by the Rules.

in outside arbitration. The Master Contract provides that decisions of the EHP are final and binding. They may, but need not, be judicially enforced.[5] The parties have further agreed in the Master Contract that the ILA shall have the right to refuse to render service to any carrier or direct employer who refuses to abide by a decision of the EHP. The provisions of any no-strike clause are rendered inapplicable in such situation.

On June 12, 1984, the EHP considered a dispute, arising in Galveston, Texas, between the ILA and West Gulf Maritime Association (WGMA)[6] with respect to the interpretation of ¶ 5 of the Containerization Agreement which provides that the minimum size of the container gang "shall consist of 18 men plus 2 drivers."[7] At the hearing before the EHP it was the union's position that in all ports ¶ 5 requires that any additional drivers above two must be secured from without the gang, notwithstanding local contracts or practice. When the matter was called for a vote, one of the management members of the panel abstained. The management co-chairman ruled that the abstention resulted in a decision in favor of the ILA, and an award was issued on June 14. The award was sent to all ILA locals and management associations coastwide.

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[5] While decisions of labor-management committees are not, strictly speaking, "arbitration awards", this Court has recognized that they are subject to enforcement in the same manner as arbitration awards. *General Drivers, Warehousemen & Helpers* v. *Riss & Co.*, 372 U.S. 517 (1963). For the sake of convenience and simplicity, petitioners will refer to the EHP decision as an arbitration award.

[6] WGMA is the employer association representing longshore employers in ports from Lake Charles, Louisiana to Brownsville, Texas and is a party to the Management-ILA Master Contract.

[7] Container "gangs" or teams of longshoremen are comprised of equipment operators or "drivers" as well as regular longshoremen who provide manual assistance but who do not operate the equipment.

The union commenced a proceeding against WGMA in the United States District Court for the Southern District of New York to enforce the EHP award. The Council of North Atlantic Shipping Associations, of which Respondent Hampton Roads Shipping Association is a member, intervened on WGMA's behalf. *See International Longshoremen's Association* v. *West Gulf Maritime Association*, 594 F. Supp. 670 (S.D.N.Y. 1984).

WGMA opposed enforcement of the EHP award in the New York action.[8] Meanwhile, employers all along the coast resisted compliance with the EHP award. When the ILA then engaged in work stoppages aimed at enforcement pursuant to the Master Contract, numerous employer associations responded by seeking preliminary injunctions to restrain the work stoppages and to compel re-arbitration of the dispute under grievance procedures in the local contracts.[9] The instant case arose when the petitioner ILA locals in Hampton Roads, Virginia, attempted to withhold labor to enforce the EHP award.

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[8] In addition to raising several procedural objections that had been considered and rejected by the EHP, WGMA claimed that the abstention by the management member did not result in a majority decision in favor of the ILA.

[9] The work stoppages to enforce the award led to litigation in 7 district courts. Appeals to the Fourth, Fifth and Eleventh Circuits followed. *ILA* v. *West Gulf Maritime Ass'n*, *supra*; *West Gulf Maritime Ass'n* v. *ILA Deepsea Local 24, etc.*, No. H-84-3362 (S.D. Tex. Aug. 13, 1984) (order granting preliminary injunction); *Hampton Roads Shipping Ass'n* v. *ILA*, No. 84-500-N (E.D. Va. Aug. 9, 1984) (order granting preliminary injunction); *S.E.L. Maduro* v. *ILA, Local 1416, Local 1416-A*, No. 84-1858-Civ. (S.D. Fla. Aug. 14, 1984) (order granting preliminary injunction); *Savannah Maritime Ass'n* v. *Local 1414, ILA*, No. 484-287 (S.D. Ga. filed Aug. 13, 1984); *South Carolina Stevedores Ass'n* v. *Local 1422, ILA*, No. 84-2007-8 (D.S.C. Sept. 11, 1984) (order granting preliminary injunction); *North Carolina Shipping Ass'n* v. *Local 1426, ILA*, No. 84-80-Civ-7 (E.D.N.C. Sept. 21, 1984) (order granting preliminary injunction).

In the case at bar, as in other cases, the district court relied on the exception to Norris-LaGuardia enunciated by this Court in *Boys Markets Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970). Despite the fact that the "18 and 2" dispute had already been arbitrated under the Master Contract, the district court found that there was an "arbitrable" dispute under the local contract and that the requirements of *Boys Markets* were satisfied. Appendix B at 25a-26a. The district court issued an injunction against any and all work stoppages, including those aimed at enforcing the EHP award, and directed local arbitration of the dispute.[10]

On appeal, the Fourth Circuit recognized that the dispute had been arbitrated before the EHP whose decision was under review in the case in New York. The court of appeals vacated the direction for local arbitration but affirmed the injunction against work stoppages aimed at enforcing the EHP award. The court rejected petitioners' contention that the Master Contract expressly gave the union the right to withhold labor as to employers who refused to comply with an EHP award. It held that this clause "is predicated upon the existence of a valid award" and that validity of the

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[10] After the injunction was issued by the district court but before the court of appeals ruled, the district court in New York dismissed the ILA's petition for enforcement and remanded the matter to the EHP on the basis that, since it could not determine the meaning and effect of the abstention, it could not decide whether an enforceable award had issued. *ILA* v. *West Gulf Maritime Ass'n*, 594 F. Supp. 670, 677 (S.D.N.Y. 1984). The court remanded to the EHP to determine the meaning and effect of the abstention. On remand the abstention question was referred to an independent arbitrator who found that the abstention resulted in an award in favor of the ILA.

Since Norris-LaGuardia deprives the federal courts of subject matter jurisdiction, *Petrusch* v. *Teamsters Local 317*, 667 F.2d 297, 300 (2d Cir. 1981), *cert. denied*, 456 U.S. 974 (1982), and absence of subject matter jurisdiction cannot be cured by subsequent events, *Smith* v. *Sperling*, 354 U.S. 91 (1957), these later events are immaterial to the question of whether the district court had jurisdiction at the time it issued the injunction.

June 12 EHP award "had been questioned in the enforcement proceedings instituted by the union in the Southern District of New York." 746 F.2d at 1017-18, Appendix A at 5a,[11] Petitioners now seek a writ of certiorari to review that judgment.

Reasons for Granting the Writ

1. *The case involves important questions of national law and policy, concerning the interpretation and application of a prior decision of this Court and the jurisdiction of federal courts to issue labor injunctions.*

In *Boys Markets* this Court established the only nonstatutory exception to Norris-LaGuardia's blanket prohibition against injunctions in labor disputes. The Court had long recognized that Norris-LaGuardia's "language is broad because Congress was intent upon taking the federal courts out of the labor injunction business." *Marine Cooks & Stewards* v. *Panama Steamship Company,* 362 U.S. 365, 369 (1960).

However, in *Boys Markets,* the Court enunciated a limited exception to Norris-LaGuardia to accommodate the Act to the national policy favoring arbitration as the method of resolving labor disputes. The Court held that, if a union has agreed to arbitrate a dispute, an injunction against a work stoppage may issue where the union is striking over an arbitrable grievance rather than proceeding to arbitration. Thus, to qualify for a *Boys Markets* injunction, the strike must have either the purpose or the effect of evading an obligation to arbitrate. *Buffalo Forge Co.* v. *United Steelworkers,* 428 U.S. 397, 408 (1976).

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[11] The Fourth Circuit did not base its affirmance upon the Southern District of New York's failure to confirm, but upon the fact that "[f]rom the inception of this litigation . . . the validity of the award has been contested, and it has not yet been resolved." 746 F.2d at 1018, Appendix A at 5a.

The policies favoring arbitration and upholding the dispute resolution mechanisms agreed to in private collective bargaining are so fundamental to national labor law that, even prior to *Boys Markets,* the Court has displayed a readiness to decide questions in this area.[12] Following *Boys Markets,* the Court has thrice elucidated upon the scope and meaning of its decision in that case. *Gateway Coal Company* v. *United Mine Workers,* 414 U.S. 368 (1974); *Buffalo Forge Co., supra; Jacksonville Bulk Terminals* v. *International Longshoremen's Association, AFL-CIO,* 457 U.S. 702 (1982). The case at bar presents a question more fundamental and important to the *Boys Markets* doctrine than any the Court has been called upon to decide since 1970.

Where a union has engaged in arbitration and obtained an award in its favor, it would seem that the goal of *Boys Markets* to protect the arbitral process, 398 U.S. at 253, has been attained. This Court has never addressed the question of whether a federal court has jurisdiction to restrain a work stoppage once an arbitration award resolving the dispute has been rendered. However, the courts of appeals in interpreting *Boys Markets* have engrafted upon agreements to arbitrate the additional obligation to obtain judicial enforcement.

In 1980 the Fifth Circuit held that a *Boys Markets* injunction, once obtained, could continue in force until the arbitration award was judicially sanctioned, "absent express agreement to the contrary." *Sea-Land Service, Inc.*

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[12] *See Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957); *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960); *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95 (1962); *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962); *International Longshoremen's Association* v. *Philadelphia Marine Trade Association,* 389 U.S. 64 (1967); *Avco Corp.* v. *Aero Lodge No. 735,* 390 U.S. 557 (1968).

v. *International Longshoremen's Association,* 625 F.2d 38, 42 (5th Cir. 1980).[13]

In the case at bar, the Fourth Circuit has gone one step further and has ruled that the union may not strike to enforce an award pending judicial confirmation even where its contract with management expressly gives it that right. The effect of the Fourth Circuit rule is to make judicial enforcement a mandatory part of the arbitral process in labor disputes. Contrary to the very *raison d'etre* of arbitration as a more expeditious, less expensive alternative to litigation, this decision makes resort to the courts a virtual certainty in every arbitrated dispute.

At the same time, the Fourth Circuit has deprived the parties, management and labor alike, of the right to settle their own affairs through collective bargaining. Under the decision for which review is sought, even an express reservation of the right to strike pending judicial review is vitiated, and a term requiring judicial enforcement implied in every labor contract to arbitrate.[14]

The effect of the decision in this case can only be a disincentive to enter agreements to arbitrate. If judicial review is a foregone conclusion, the advantages of the arbitral system are shorn away. Unions are hardly likely to bargain away their right to self-help for an alternative in which, even when they prevail, the fruits of victory are postponed until after long and costly legal battles.[15]

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[13] In *Sea-Land* the strike had occurred and the injunction had issued prior to the arbitration. The court was not confronted with a situation where the injunction was applied for in the first instance only after an arbitration award had already been rendered.

[14] This Court is well aware that a preliminary injunction is often dispositive in a labor dispute. *Buffalo Forge*, 428 U.S. at 412. The game is for the employer to get the injunction and "head for the hills."

[15] In *Boys Markets*, the Court recognized that employers will be unwilling to enter into agreements to arbitrate if a union retains

(footnote continued on following page)

The ramifications for the policies favoring arbitration and the speedy resolution of labor disputes and for the free collective bargaining process would warrant review by this Court in any event. Moreover, since the case involves the jurisdiction of United States courts under an act of Congress, it should be decided by the Supreme Court, which has the prime responsibility for the proper functioning of the federal judiciary.

Review is all the more called for because what is at issue is the application and effect of a prior decision of the Supreme Court. *Boys Markets* injunctions are a creature of this Court. Only it can define their limits. The question of whether the bar of Norris-LaGuardia is lifted after the parties have complied with their duty to arbitrate is so basic as to require resolution by the highest Court.

2. *The Court should grant certiorari to resolve a conflict among the circuits as to whether a federal court has jurisdiction to restrain a work stoppage where the union has reserved the right to strike to enforce an arbitration award.*

The Fourth Circuit's decision in this case is directly at odds with the previous decision of the Fifth Circuit in *Sea-Land*. The Management-ILA Master Contract contains the express reservation of the right to strike which *Sea-Land* recognizes as efficacious during the period pending judicial confirmation. *Sea-Land*, 625 F.2d at 42. *West Gulf Maritime Association*, Appendix E at 46a. (The contractual provision is set forth in the Fifth Circuit's opinion. Ap-

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(footnote continued from previous page)

the right to strike rather than resorting to the arbitration machinery. 398 U.S. at 248. If federal courts were without jurisdiction to enforce the agreement to arbitrate, the federal policy favoring arbitration would be frustrated. Correspondingly, if unions are required to seek judicial confirmation of the award prior to resorting to self-help, they will be equally discouraged from entering into arbitration agreements, and the federal policy will be similarly frustrated.

pendix E at 37a.) The rule in the Fourth Circuit denies effect to the reservation.

In another case arising out of the union's efforts to enforce the June 12, 1984, EHP award, the Fifth Circuit reaffirmed the *Sea-Land* doctrine while holding that the principle of comity required the district court in Texas to defer to the district court in New York. *West Gulf Maritime Association,* Appendix E at 46a.

The conflict between the two circuits could not be more open or direct. Since a third case generated by the same arbitral award will be argued before the Eleventh Circuit in March 1985, still another court of appeals will be drawn into the conflict. The Eleventh Circuit may adopt one of the two positions already enunciated or may arrive at still another interpretation of *Boys Markets* that conflicts with both.

A split in the circuits on such a basic and important question of national labor law is, in and of itself, grounds for review by the Supreme Court. When that split is occasioned by disagreement among the courts of appeals as to the meaning and intent of this Court's prior decision, the grounds are more compelling.

The present case presents still an additional factor favoring Supreme Court review. The conflict here involves not merely differing views about a principle of law but disagreement as to the rights and duties under the same collective bargaining agreement. Although intended to be uniform in every ILA port, the Master Contract will, if the present situation is not altered, have different effects in different jurisdictions. The ramifications this has for collective bargaining in an industry vital to the nation's economy urge this Court to resolve the conflict.

Ironically, the decision for which review is sought fosters precisely the harm which had been envisioned by the dis-

trict courts.[16] Ports in the Fifth Circuit may be placed at a competitive disadvantage vis-a-vis those in the Fourth. Ports in the Eleventh Circuit will be advantaged or disadvantaged in relation to the neighboring jurisdictions, depending on how that Circuit rules.

Because this case involves collective bargaining in a major industry and has the judicially recognized potential to affect established patterns of trade and the national economy, this Court should grant a writ of certiorari to resolve the conflict among the circuits.

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Fourth Circuit in this case.

Dated: February 14, 1985

Respectfully submitted,

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[16] Each district court found as the irreparable harm necessary to a preliminary injunction the likelihood that, if the EHP's interpretation of the Containerization Agreement were applied in its port, cargo would be diverted to other ports where a different interpretation made for lower costs. Traffic lost during the pendency of confirmation (8 months to date, and there is still no decision) may never be recaptured.

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Appendix A
Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1834

HAMPTON ROADS SHIPPING ASSOCIATION, on behalf of its members, jointly and severally,

Appellees,

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL-CIO), and its Affiliated Locals in the Ports of Hampton Roads,

LOCAL 846, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

LOCAL 970, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

LOCAL 1248, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Appellants.

SOUTH CAROLINA STEVEDORES ASSOC.,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, Judge. (C/A 84-500-N).

Argued: October 1, 1984 Decided: October 23, 1984

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Ernest L. Mathews, Jr. (Charles R. Goldburg; Thomas W. Gleason on brief) for Appellants; Braden Vandeventer (Daniel R. Weckstein, Ray W. King, Vandeventer, Black, Meredith & Martin on brief) for Appellees; Charles A. Edwards (Greene, Buckley, DeRieux & Jones; Edward D. Buckley, Bailey & Buckley on brief) for Amicus Curiae.

BUTZNER, Senior Circuit Judge:

The International Longshoremen's Association and several affiliated locals (collectively the union) appeal from the entry of a preliminary injunction in an action brought by Hampton Roads Shipping Association. The injunction restrains the union from striking and requires the parties to arbitrate a dispute pursuant to the provisions of their local contract. Because the dispute is presently the subject of both arbitration under their master contract and litigation in the Southern District of New York, we affirm the restraint against a strike and vacate the order to engage in arbitration under the local contract.

I

The Shipping Association is a multiemployer, collective bargaining association that represents employers in Hampton Roads, Virginia, in negotiations with the union. The union supplies longshoremen and other waterfront employees to the Hampton Roads ports. The relationship between the union and the association is regulated by master and local contracts. The parties disagree over whether the master contract or the local contract governs a dispute about extra drivers for container gangs.

The parties to the master contract are the International and a group of regional shipping associations representing employers in 34 (sic) ports on the east coast and in the Gulf of Mexico. One of the regional associations is the Council of

North Atlantic Shipping Associations, of which the Shipping Association is a member.

The master contract includes a containerization agreement, which, among other things, specifies: "The minimum size of the container gang used in loading or unloading containers to or from container ships shall consist of 18 men plus two drivers." It also provides that alleged violations of the containerization agreement are first considered locally. If the dispute is not resolved, it is referred to the emergency hearing panel, which consists of an equal number of representatives from the union and the regional shipping associations. A decision of a majority of the panel is an enforceable arbitration award. If the panel deadlocks, a third party is selected to break the deadlock, and his decision becomes the arbitration award. The contract permits the International to withhold its services from any employer who refuses to abide by an arbitration award, and in this event, a local no-strike clause shall be inapplicable.

The local contract between the Shipping Association and the union also provides for a minimum gang of 18 men plus 2 drivers. In addition, it stipulates that utilization of the members of the gang is at the discretion of the employer. The local contract provides for the arbitration of grievances by an arbitrator selected from a panel named by the Federal Mediation and Conciliation Service. It contains a no-strike clause.

II

On June 12, 1984, the emergency hearing panel considered a grievance concerning the use of container gangs in the Port of Galveston, Texas, and issued an award containing two provisions. It first determined that under the master contract a container gang consisted of 18 men plus 2 drivers and that should additional drivers be required, they must be drawn from outside the gang. The award also

provided that it applied to all parties to the master contract.* The Shipping Association promptly stated that it considered the panel's interpretation to be invalid, that it would not abide by it, and that the award should be withdrawn.

The union filed suit against the West Gulf Maritime Association in the Southern District of New York to enforce the panel's award on June 28, 1984. The Council of North Atlantic Shipping Associations has intervened in the New York action to contest the award. On August 29, 1984, the court held that the record was insufficient for it to determine whether an award had been made. Consequently, it remanded the matter to the panel with directions that it supplement the record by answering a number of questions. The court added that if the questions were resolved in the union's favor, the court would then have occasion to consider the remaining objections to the enforcement of the award. These objections include, the court noted, the contention that "the grievance which led to the award was local in nature and not properly a Master Contract concern." At this stage of the proceedings, the court refrained from deciding if it or an arbitrator should determine whether the grievance is local or regional.

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* On June 14, 1984, the cochairmen of the panel, representing the employers and the union, sent the following letter to all parties to the master contract:

> At a meeting of the Management-ILA Emergency Hearing Panel held June 12, 1984 the following determination was made:
>
> That in accordance with the provisions of the Master Collective Bargaining Agreement, negotiated by and agreed to by the parties, the minimum size of a container gang shall be 18 men plus two drivers and that should additional drivers be required such drivers are to be drawn from outside the gang and shall not be part of the regular 20 man gang.
>
> It is required that this determination be lived up to its fullest intent by all parties.

On remand from the district court, the panel deadlocked. In accordance with its rules of procedure, the issue has been submitted to a third party arbitrator.

In the meantime, the union informed the Shipping Association that as of August 1, 1984, it would refuse to provide gangs to the ports of Hampton Roads unless additional drivers were hired from outside the gang as required by the emergency hearing panel's award. The Shipping Association brought a grievance and sought on-site resolution of the dispute pursuant to the local contract, which resulted in deadlock. On August 1, the Association applied for a preliminary injunction in the Eastern District of Virginia to prevent the strike pending arbitration under the local contract. It contended that the dispute is a local matter because the utilization of gangs is governed by the local contract. It proved that for many years employers in Hampton Roads have assigned extra drivers from the 20 member gang. The district court issued the injunction on August 9, 1984, and ordered the parties to arbitrate under the local contract.

III

We cannot accept the union's argument that at the time the district court entered the preliminary injunction an award by the emergency hearing panel justified withholding the services of union members pursuant to the master contract. The clause on which the union relies is predicated on the existence of a valid award. From the inception of this litigation, however, the validity of the award has been contested, and it has not yet been resolved. Indeed, even before the action in the Eastern District of Virginia was commenced, the validity of the award had been questioned in the enforcement proceedings instituted by the union in the Southern District of New York.

The master contract contains a provision for submitting disputes about the container agreement to binding arbitra-

tion. Consequently, although the contract does not contain an express no-strike clause, an implied obligation arises not to strike over this dispute. Moreover, this implied no-strike obligation is a sufficient predicate for an injunction when it is coupled with other factors justifying relief. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 380-82 (1974).

The district court's findings that the Shipping Association would be irreparably injured by a strike, and that the public interest would be served by maintaining operation of the ports of Hampton Roads, are amply supported by the evidence. The record also discloses that the Council, the Shipping Association's collective bargaining representative, has participated in the arbitration of this dispute and is a litigant in the New York enforcement proceedings. Thus, the Shipping Association is privy to both the arbitration and the litigation. As long as the Shipping Association seeks to resolve the dispute through the Council in arbitration and judicial proceedings, it is entitled to enforcement of the union's obligation not to strike. Boys Market, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970).

Because the parties are already engaged in arbitration and enforcement proceedings in which the validity of the award and the nature of the dispute—whether it be local or regional—can be considered, the district court's order for local arbitration is unnecessary. We perceive no reason why essentially the same issues should be arbitrated and litigated simultaneously on both regional and local levels.

Accordingly, the case is remanded to the district court for modification of its preliminary injunction to bring it in conformity with this opinion and for other proceedings that the district court may find appropriate. Our mandate shall issue forthwith. Each party shall bear its own costs.

SPROUSE, Circuit Judge, concurring:

I concur in what Judge Butzner has written except that I would interpret the master contract to require that arbitration on containerization issues be conducted under the procedures created pursuant to the master contract. Neither the master contract nor the Hampton Roads local contract specifically addresses the problem of possibly conflicting grievance procedures. Disputes concerning containerization, however, have long plagued the shipping industry. Because the industry and the unions responded to these disputes by creating in the master contract a specific and comprehensive grievance device, it appears to me that they intended this device to be a vehicle for resolution of all containerization disputes.

I feel, therefore, that the district court committed error when it enjoined the unions from violating the no-strike clause of the local union agreement because, in my opinion, the local agreement did not govern the underlying issue. As the parties are in the process of resolving their dispute under the grievance provisions of the master contract, and I agree that there was an implied no-strike clause in the master contract, I concur in the opinion.

Appendix B

Opinion of District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

Civil Action No. 84-500-N

HAMPTON ROADS SHIPPING ASSOCIATION, on behalf of its members, jointly and severally,

Plaintiffs,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL-CIO), and its Affiliated Locals in the Port of Hampton Roads,

Defendants.

OPINION

I. INTRODUCTION

Seeking a preliminary injunction, the plaintiffs brought this suit to enforce an arbitration clause in a contract between the Hampton Roads Shipping Association (HRSA) and the International Longshoremen's Association (ILA), as well as its affiliated locals in the port of Hampton Roads, Virginia. The plaintiffs seek to require the defendants to arbitrate pursuant to the "Hampton Roads contract" while maintaining the status quo in the port, and to enjoin the defendants from striking or creating a work stoppage in Hampton Roads pending an arbitrated determination of the issue in accordance with Sections 37 and 38 of said contract (See Exhibits 3 and 4). The underlying issue concerns the utilization of the stevedore gang on the one

hand or the size of the gang on the other. It is a question of requiring more men to do the work formerly performed by less through interpretation of the contract rather than negotiation of the contract.

The defendants argue that the issue has already been arbitrated pursuant to other agreements affecting the parties, some parts of which are specifically entitled the "Master Agreement" and some parts of which are referred to from time to time as the "master contract" and which are contained in Exhibit 5 as parts: 1; 2; 3(a); 3(d); 8; and 10. The defendants contend that there is nothing left to arbitrate as they claim that an arbitration of a local grievance between the West Gulf Maritime Association and Local 20 of the ILA of Galveston, Texas conclusively decided the issue at an earlier date. According to the defendants, the resolution of the Galveston Local 20 grievance eliminated any requirement for arbitration and, therefore, any jurisdiction for arbitration in Hampton Roads. The defendants maintain that the Hampton Roads contract is at variance with the Master Agreement and that the Master Agreement takes precedence over the Hampton Roads contract. (See paragraph 5 of the answer).

In essence, the Union maintains that the final determination of the Galveston, Texas Local 20 grievance with the West Gulf Maritime Association bound each and every port association which was a party to the portion of what the Union calls the Master Contract, specifically the Work Incentive Agreement of June 19, 1981. All parties agree that there is a grievance between Hampton Roads Shipping Association and the defendants and that the agreements contain no-strike clauses. However, the defendants claim exception from the no-strike clauses by virtue of the Galveston, Texas-West Gulf mediation.

After hearing the evidence and analyzing the Hampton Roads contract and the other varied agreements between or affecting the parties, this Court has adopted the plaintiff's

position requiring the defendants to proceed with the local arbitration, invoking the no-strike provisions and rejects the defendants' position for the reasons set forth herein.

The various agreements seem to create a reader's quagmire which to some may appear to have been the result of a drafter's nightmare. This Court endeavors to chart a course in the hopes that others do not sink into the many strands of quicksand that lie along the paths waiting to engulf the unwary explorer.

II. How the Dispute Arose: Factual Background

The Hampton Roads Shipping Association is a multi-employer collective-bargaining association which represents the Hampton Roads maritime industry employers in their negotiations with the International Longshoremen's Association and its local affiliates. HRSA also belongs to and is a member of the Council of North Atlantic Shipping Associations.

The ILA (AFL-CIO), and its affiliated Locals in the Port of Hampton Roads, including Local 846, 970 and 1248, are all defendants and supply the stevedores or longshoremen on the vessels arriving and departing the Hampton Roads ports.

Due to the rapid growth of containerization of cargo at seaports, by 1968 maritime industry management and union representatives entered into agreements incorporating containerization rules accommodating the interests of both sides.

Initially in 1968, the agreements specified the size of the gang to be 19 men. In 1977, "the Containerization agreement" was amended to provide as follows:

> 5. The minimum size of the container gang used in loading or unloading containers to or from container ships shall consist of 18 men plus two drivers.

The Council of North Atlantic Shipping Associations, of which Hampton Roads Shipping Association is a member, and other shipping associations entered into contracts which adopted the same language with the Union in 1977 and in 1980 and lastly in Bal Harbour, Florida on September 26, 1983, which extended the provision to September 30, 1986 (See Exhibit 5, Part 1, pages 2 and 3; Exhibit 5, Part 3(a), paragraph 5).

Entered into in Virginia on February 2, 1984, the Hampton Roads contract contains a provision relating to the gang size which may be found at Section 50A of Exhibit 3 and Exhibit 4. The provision reads as follows:

> 1. Gang Size for Handling of Containers
>
> When handling containers eighteen (18) men plus two (2) drivers will be used. The utilization and placement of the men in the gang to be at the Employer's discretion. Crane operators, whether hired by the terminal company or by the stevedore, will be counted as part of the eighteen (18) man gang.
>
> The container gang will perform no lashing. When lashing or unlashing is required, a lashing gang, with a minimum of a header and six (6) men, will be utilized. This clause does not apply to barges. When working container or combo ships, lashing gangs will receive a 20 cents differential.[1]
>
> (a) When holdmen are being used to stuff or unstuff containers on the dock or on deck there will be no simultaneous loading or discharging in the hatch by the gang.

---

[1] The last sentence of the second paragraph concerning the 20 cent differential was added as a result of the February 2, 1984 negotiations between the ILA and the Hampton Roads Shipping Association.

(b) When carpenters are required for securing cargo, a minimum gang of a header and three men shall be employed.

The wording concerning size and utilization in the local agreement, except for the last sentence of paragraph 2 concerning the 20 cent differential, was the same for the 1977 through 1980 contract, the 1980 through 1983 contract and the 1983 through 1986 contract last negotiated on February 2, 1984.

The Union alleges in paragraph 5 of its answer that the wording of the local agreement with regard to the size of the gang "is at variance with the Master Contract which takes precedent (sic) over the local agreement."

The only agreement which the undersigned could find that made reference to the various agreements and seemingly tied the different contracts and agreements together was the agreement signed on January 26, 1984 in Miami, Florida. The Union and various steamship carriers and shipping associations including the Council of North Atlantic Shipping Associations incorporated the various agreements and provided in Articles II and III as follows in Part 2 of Exhibit 5:

> II. Said Steamship Carriers by executing this Agreement hereby subscribe to and become parties to the following Agreements and any amendments thereto with the same force and effect as if said Steamship Carrier actually executed, signed and subscribed to said Agreements. Said Agreements are the following:
>
> 1. The Master Agreement first executed May 27, 1980 as thereafter amended on April 16, 1983 and on September 26, 1983. [Exhibit 5, parts 1, 2, 3(a), 3(d), 8 and 10]
>
> 2. The Management ILA Agreement dated December 6, 1980. [Exhibit 5, part 4]

3. The Resolution of March 26, 1981. [Exhibit 5, part 5]

4. The Tampa Agreement of May 4, 1981. [Exhibit 5, part 6]

5. The Charleston Agreement of May, 1981. [Exhibit 5, part 7]

6. The Work Incentive Agreement of June 19, 1981. [Exhibit 5, part 8]

7. The Rules on Containers as now in effect and as may hereafter be amended in accordance with its terms. [Exhibit 5, part 3(d)]

8. The Containerization Agreement. [Exhibit 5, parts 3A and 10]

9. The JSP Agreement. [Exhibit 5, parts 3(c) and 9]

10. Each and every Local Agreement which may hereafter be entered into or which is presently in effect in each of said 36 ILA ports affecting the terms and conditions of employment of employees actually employed or utilized aboard the steamship vessels of said Steamship Carriers. [Exhibits 3 and 4, HRSA agreement]

III. The Steamship Carriers agree to be bound by the determination of the various management and labor tribunals named in each said Master and Local Agreements.

Any determination of the tribunal named in the Master Agreement or in any of the Local Agreements shall have the effect of an arbitration determination and may be enforced by either party in any Federal District Court having jurisdiction of the parties.

All of the contracts expire on September 30 every three years, thus, in 1977, 1980, 1983 and 1986. The negotiations

generally are conducted for all contracts by an international vice president of the ILA, including the local agreements such as in Hampton Roads. The local agreements are executed on behalf of the international union by an international vice president and by the respective shipping associations.

III. HRSA Position on Events

On July 25, 1984, HRSA was informed by the international vice president of the ILA that as of August 1, 1984, the ILA would no longer allow additional drivers to be taken from the 20 man cargo gang other than the two specified drivers, and further that any additional drivers would have to be added to the 20 man crew. (See Exhibit 6). This position was contrary to the understanding that existed in Hampton Roads for a minimum of at least the proceeding (sic) seven years as evidenced by the negotiations of the three local contracts for the period beginning in 1977, 1980, and 1983 as well as for the negotiations of the three so-called Master Contracts. The Union claims that the new interpretation was mandated by a resolution of a Management-ILA Emergency Panel determination relating to dispute (sic) concerning the Galveston, Texas port to be discussed later in the opinion.

HRSA immediately brought a grievance and contended that this new union labor demand constituted a strike or work stoppage under the Hampton Roads contract and sought arbitration thereunder. The pertinent contract provisions follow:

Section 37

Prohibition of Lockouts, Strikes or Work Stoppages

> During the life of this agreement, the party of the first part agrees there shall be no lockouts or work stoppages by the Employers, but this shall not be construed

to mean a lay-off of Employees due to business conditions, and the party of the second party (sic) agrees there shall be no strikes or work stoppages by the Employees. The right of the Employees not to cross a bona fide picket line is recognized by the Employers. In addition, said contract provides under Section 38:

SECTION 38

ARBITRATION CLAUSE

(a) DISPOSITION

Any grievance, dispute, complaint or claim arising out of or relating to this agreement shall be handled and disposed of in the manner hereinafter provided, and all the parties hereto agree to abide by any decision made in accordance therewith.

(b) INITIAL PROCEDURE.

On Job. When a dispute occurs, either the employer representative (Stevedore, Pier Superintendent or appropriate designate of the Employer) or Hatch Foreman or the ILA representative shall immediately call the problem to the attention of the other party. Meanwhile, work must continue. Every effort shall be made to reach a settlement consistent with the contract. If there be a failure to reach agreement, either party may immediately call for a member of the Arbitration Committee of the Hampton Roads Shipping Association and the International Vice President of ILA, AFL-CIO for the Port of Hampton Roads or his designated representative to come at once to the place of the dispute and attempt to resolve the problem.

(c) ARBITRATION COMMITTEE . . .

(d) APPLICATION TO FEDERAL MEDIATION AND CONCILIATION SERVICE . . .

On August 1, 1984, prior to the commencement of working by the first crew, the HRSA sought an on-site dispute resolution under Section (b) which ended in deadlock. Later that day, an arbitration committee (Section (c)) deadlocked as ILA representatives claimed "no jurisdiction" existed in the Hampton Roads area since, in their opinion, an Emergency Panel decision of June 12, 1984 in New York had decided the very issue in a Galveston, Texas dispute.

HRSA denied that the Emergency Panel had heard any grievance which even purported to affect Hampton Roads or that the Panel's decision in any way applied to the Hampton Roads ports. HRSA moved this Court for a preliminary injunction to require arbitration to prevent work stoppage and to stop irreparable harm to the Hampton Roads port resulting from potential economic diversion.

IV. The ILA Position

Though it had complied initially with Hampton Roads arbitration procedures by appearing, the ILA asserted that the container gang utilization problem was entirely a "Master" Agreement issue. Further, the ILA claimed that the arbitration procedures of the Master Contract governed this controversy and the use and size question was already conclusively decided by virtue of a decision concerning Galveston, Texas. The pertinent arbitration provisions of the Master Agreement are contained in the Work Incentive Agreement of June 19, 1981, which is Part 8 of Exhibit 5 and states:

> 6. Management, the Carriers and Direct Employers hereby re-affirm and clarify the enforcement procedures which will be followed in order to protect and preserve the work of the ILA which is covered by the said Master Agreement. The enforcement procedures shall be as follows:

A. An initial charge of alleged violation of the Containerization Agreement in the Master Agreement shall be heard under the procedures agreed upon in a local port by the local Port Association and the local representatives of the ILA. Such procedure shall be completed within ten days after the charge is filed.

B. Where there is a failure to agree on the local level, or where a party desires to appeal any decision rendered pursuant to Step One in Paragraph (1) above, such cases shall be referred to the Management-ILA Emergency Hearing Panel referred to below.

C. The Management-ILA Emergency Hearing Panel shall consist of the following members

(i) *Representing Management*

New York Shipping Association, Inc.	–1
Council of North Atlantic Shipping Associations	–1
West Gulf Maritime Association	–1
New Orleans Steamship Association	–1
Mobile Steamship Association	–1
Southeast Florida Employers Association	–1
South Atlantic Employers Negotiating Committee	–1
Carriers	–2
Direct Employers	–2

(ii) *Representing ILA*

An equal number of ILA Vice Presidents, or other ILA representatives are to be designated by the President of the ILA.

(iii) A quorum shall consist of a majority of each side of the panel and each side of the panel shall have an equal number of votes. Each side shall have the right to designate alternates.

(iv) The decision of the panel, rendered by a majority vote thereof shall be final and binding and shall constitute an enforceable award. In the event of a deadlock by the Panel, the President of the ILA and the President of NYSA shall select (within two days of the deadlock) a third party to break the deadlock.

D. Appeals from a decision by the local port association and the ILA, under Step One, must be taken within twenty (20) days after such decision. Pending such appeal work will continue.

E. The ILA shall have the right to refuse to render service to any carrier or direct employer (but only with respect to the carrier charged) who, after a determination under Steps One or Two above, has been found to have violated the provisions of the said Master Agreement, and who refuses to abide by the decisions rendered under Steps One and Two above, and the provisions of any no-strike clause shall be rendered inapplicable in such situation.

F. Charges of alleged violations of the Master Agreement involving more than one port shall be referred directly to the Management-ILA Emergency Hearing Panel for final determination.

The Management-Union Emergency Panel mentioned, *supra*, met on June 12, 1984 in New York City to hear eleven (11) grievances which were unresolved at the local level of various ports pursuant to arbitration procedures (Sections 6(A)-(D), *supra*).

On June 7, 1984, a letter from the ILA's executive secretary added the following "grievance" to the 10-item agenda of the panel. It stated:

GALVESTON, TEXAS

Local #20, ILA against West Gulf Maritime Association complaint that heavy lift operators (Port-O-Packer operators) are assigned out of the 20-man gang (Letters of May 22, 1984 and June 7, 1984 attached). [Defense Exhibit 5]

As can be seen, the port of Galveston, Texas was underlined in capital letters; there was no mention of "driver". Further the letter was noted to be "a grievance" . . . "against West Gulf Maritime Association." As added to the minutes it provided as follows:

> Min. 6. Galveston, Texas.—Local #20, ILA against West Gulf Maritime Association complaint that heavy lift operators (Port-O-Packers) are assigned out of the 20-man gang (Letters of May 22, 1984 and June 7, 1984 attached) (Item #6 on the Agenda).

In each instance the port is Galveston, Texas. At all times "grievance" was identified as a Local ILA Number 20 issue not a national or international one. It no way applied to Local 846, 970 or 1248.

The Galveston Local 20 had "charged" the port of Galveston, Texas not any other port. Evidently there was no agreement at the local level under Section (A), *supra*, and accordingly, the Emergency Panel heard the grievance. Following what can best be interpreted through the minutes as disputed dialogues, the following resolution arose from Mr. Bowers, the international vice president of the Union, who also was a negotiator at Hampton Roads:

> . . . that the gang size shall be 18 plus two with drivers added to the twenty.

The minutes of the meeting of June 12, 1984, concerning the action of one of management's representatives, stated as follows:

> Mr. Costello stated that he would abstain from voting, however, he subsequently stated he would stand by the Master Contract. This was considered a vote in favor of the Motion.

This wording by Costello was considered the winning vote in favor of the Union because without his statement the Union would not have had the sufficient votes.

The charge made by Local 20 of the ILA against the West Gulf Maritime Association concerning the port of Galveston, Texas, on the basis of the above motion was then codified as follows:

> That in accordance with the provisions of the Master Collective Bargaining Agreement, negotiated by and agreed to by the parties, the minimum size of a container gang shall be 18 men plus two drivers and that should additional drivers be required such drivers are to be drawn from outside the gang and shall not be part of the regular 20 man gang.

V. The Court's View

In making a determination as to the nature of this contract, and what has taken place, there is no requirement that either party exercise due process, but the Court notes that it was completely lacking in any alleged determination which was supposedly rendered on June 12 and 13, 1984, if indeed there was one so rendered. The Court finds as a fact that what was acted upon on June 12 and 13, 1984 by the Emergency Hearing Panel was a local grievance or charge made against the West Gulf Maritime Association concerning only the port of Galveston, Texas, a local port. No other port was listed, either in the notice or in the agenda. No other association was "charged" other than the West Gulf Maritime Association.

This Court further finds that the Hampton Roads Shipping Association has never been charged with a grievance. This Court invited the Union to charge the Hampton Roads Shipping Association with a grievance under Clause 6(A) of the Master Agreement. The ILA chose instead to rely on the Emergency Panel resolution of June 12, 1984, which supposedly solved a Galveston, Texas port problem, and no other port problem. The so-called Master Agreement gave no right to Locals 846, 970 or 1248 to engage in a work stoppage since the very wording of paragraph E of the so-called Master Contract allows refusal to render service "only with respect to the carrier charged". Hampton Roads Shipping Association was not "charged". Neither Hampton Roads nor any of its ports such as Norfolk, Portsmouth or Newport News were charged.

VI. Contract

In analyzing the contract, the Court must apply certain stated contractual principles. The meaning of the parties must be ascertained by the terms of the writing and not by looking at a part of it. *See Boardman* v. *Reed*, 31 U.S. 327, 344 (1832). Nor can the mental purpose of one of the parties to the written agreement change its terms. *See New York Central Ry. Co.* v. *Mohney*, 252 U.S. 152, 157 (1920). Where several writings are connected by internal references to each other, even if they were executed on different dates and were not among all of the same parties, they will constitute a single contract as long as they involve the same subject matter and prove to be parts of an entire transaction. *See Gordon* v. *Vincent Youmans, Inc.*, 358 F.2d 261 (2d Cir. 1965); *Commercial Contractors, Inc.* v. *U.S. Fidelity & Guaranty Co.*, 524 F.2d 944, 950 (5th Cir. 1975). Moreover, it appears that any conflicting contractual provisions are to be construed with a view towards reconciliation and that interpretation and construction

must be such as to reconcile clauses that might seem repugnant. *See International Electors, Inc.* v. *Wilhoit Steel Erectors and Rental Service,* 400 F.2d 465, 469 (5th Cir. 1968); *Papago Tribal Utility Authority* v. *Federal Energy Regulatory Commission,* 610 F.2d 914, 929 (D.C. Cir. Decided 1979, as amended 1980).

These principles require this Court to conclude that the Hampton Roads contract, Exhibits 3 and 4, executed by the ILA by its international vice president and negotiated by a vice president of the International union dispatched from New York is on a par with all the other ILA contracts affecting the Hampton Roads Shipping Association. Counsel has pointed to no clause requiring one contract to take precedence over another, nor has this Court found such a clause. This Court finds, indeed, that the parties to the agreement of January 25, 1984, executed in Miami, Florida, on January 26, 1984, intended to list all the agreements and give them an equivalent status. This Court finds that neither type of arbitration is superior to the other. The arbitration listed or provided by the Emergency Panel as set forth in the Work Incentive Agreement of June 19, 1981, is on a par with the arbitration provisions provided in the contract with HRSA (Exhibit 3). Moreover, the Court finds as a fact for the purposes of this opinion, on the limited evidence presented, that Paragraph 5 of the Containerization Agreement concerning the minimum size and utilization of the gang is in no way repugnant or contrary to Section 50A of the HRSA contract with ILA, Exhibit 3. They supplant one another rather than contradict.

There is no question that it had been the understanding of all the parties from at least 1977 up until at least June 12, 1984, that the utilization of the 18 men was at the employer's discretion. Thus, the employers decided whether they could be utilized as drivers. Up to 6 men had been utilized as drivers from the 20 men and this custom was

known throughout the industry and other ports as the "Norfolk Agreement." This Court finds as a fact that the ILA was aware of the terms of this Norfolk Agreement, was well versed in it and had negotiated with HRSA on at least three different contracts with this Norfolk Agreement in mind. In contrast to the Norfolk Agreement, the Baltimore Agreement provided that members of the container gang perform the work of lashing and unlashing of containers from the 18 men crew while 8 men were to be holdmen in Baltimore. In Hampton Roads, a separate lashing crew of 7 men is required by the local contract. Ports to the south and ports to the north have different agreements concerning utilization of crews. All of these agreements were negotiated with the understanding that the contractual reference to "men" in the gang was to be construed as bargained for by the international vice presidents for the ILA and by the employer shipping associations in regard to the demands of particular ports and practices in these ports.

VII. Boys Market Injunction Requisite Met and Irreparable Injury to Hampton Roads Ports Imminent

In a labor dispute such as this, a federal district court must determine whether an injunction to enforce arbitration is proper within the dictates of *Boys Market, Inc.* v. *Retail Clerks Union Local 770,* 398 U.S. 235 (1970).

In the *Boys Market* case, the Supreme Court was required to construe the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §104, in light of arbitration clauses enforceable under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), which delineates United States district court jurisdiction in labor contract disputes. In *Boys Market,* a strike was called which violated a collective-bargaining agreement no-strike clause which required arbitration. It held that, in such nar-

row circumstances, federal court injunctive action was proper to enforce and promote arbitration. The *Boys Market* case is considered to have established three prerequisites for a federal district court's jurisdiction to enjoin a strike: (1) the strike must be in breach of a no-strike obligation under an effective collective-bargaining agreement; (2) the strike must be over an arbitrable grievance; and (3) both parties must be contractually bound to arbitrate the underlying grievance caused by the strike. *Jacksonville Maritime Association* v. *ILA*, 571 F.2d 319, 323 (5th Cir. 1978). Additionally, the Fifth Circuit in *Jacksonville* stated with regard to traditional injunctions, at page 322 of the opinion, as follows:

> [A] preliminary injunction remains an extraordinary remedy, and the district court may exercise its discretion only within certain well-established guidelines. In every case the court must conclude that the movant has met four prerequisites for this drastic remedy. These are: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if it is issued, would not be adverse to the public interest.

Therefore, seven criteria must be reviewed by this Court to determine whether an injunction enforcing arbitration is appropriate. *Jacksonville, supra,* at 323.

Effective August 1, 1984, the ILA ordered that no more than 2 men from within the 20 man gang act as drivers in loading and unloading containers in Hampton Roads. Not only was this a complete change from prior practice, it was also a complete change from the contract provisions.

Management immediately brought a grievance against the Union the same day that the Union desired to implement this rule. Under the terms of Hampton Roads contract, Section 38, the Union would be bound to follow arbitration rules as contained therein, particularly if the ILA's actions constituted a strike or work stoppage barred by Section 37 of the contract.

Since Section 37 of the Hampton Roads contract does not clearly define "strike or work stoppage", the Court referred to the definition as stated in the National Labor Relations Act, 29 U.S.C. §142(2):

> The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

This Court concludes that the ILA's refusal to allow gang members from the 18 men gang to act as drivers as was previously customary constituted a strike or work stoppage in violation of this no-strike clause. In the *Jacksonville* case, the district court utilized a similar analysis and the Fifth Circuit in affirming the lower court stated:

> We cannot say that this conclusion, or the method by which the district court arrived at it, was erroneous. Certainly federal law permeates the relationships between the parties, and in the absence of specific contractual provisions the federal statutory definition is strong evidence of the understanding of the parties about the meaning of "strike." Id. at 323.

The Court finds that the underlying issue in this matter, that is, the composition of work gangs in Hampton Roads, was fully arbitrable under the Hampton Roads contract

clause, Section 38 above, and that the parties to this cause were bound by the local contract. Hence, the dictates of the *Boys Market* case are satisfied in this case.

As for traditional injunction requisites, the Court finds that the plaintiff HRSA would likely prevail on the merits, in that the underlying dispute is arbitrable under the Hampton Roads contract. Further, this Court believes that the balancing of hardships favors the HRSA since it merely seeks to retain the status quo that existed at the time of the requested arbitration of August 1, 1984, without a sudden change in labor requirements. The public interest certainly favors the resolution of a dispute in order to avoid a strike in a competitive seaport.

Moreover, the Agreement dated January 25, 1984 executed January 26, 1984 clearly anticipates enforcement of any "arbitration determination . . . by either party in any Federal District Court having jurisdiction. . . ." (See Roman Numeral III on Page 7 of this opinion).

Thus, the parties anticipated enforcement in a Federal District Court and, certainly, and necessarily anticipated "the enforcement" would include arbitration. This Court is merely enforcing what the parties contracted for in a court the parties anticipated such enforcement to take place.

This Court further finds as a fact that the Union exercised selective enforcement by choosing to use the ports in Norfolk or Hampton Roads. This Court finds as a factual matter that serious economic losses will cause irreparable harm to this port if allowed to continue. The ports to the north and south will gain substantial economic preference causing severe economic loss to this port.

In fact, the Court finds the elements of a traditional injunction were met and adopts its opinion of August 2, 1984. A second hearing was set to determine what the other ports were doing concerning this matter in order to determine if there was irreparable injury. At this second

hearing, the Court allowed the ILA to present further evidence, but it did not change any of the reasoning set forth in its opinion of August 2, 1984, nor was the Court convinced of any reason to change its opinion previously set forth. The Hampton Roads Shipping Association was permitted to present its evidence. The Court learned that the other United States ports, from the period of time from August 1, 1984 through and including August 6, 1984, were not complying with any new ILA work gang demands. In fact, they were not even requested to comply until after the information concerning this suit was promulgated to them. Even then, Baltimore was not requested to comply until August 6th, two days before the contemplated second hearing in this matter and in a manner which does not seem possible under the Master Contract or the so-called Emergency Hearing Panel resolution. The Hampton Roads ports were used by the ILA in that it was the first port tested by the new ILA work gang issue.

The *Jacksonville* court held that "the effect of a long-term diversion of business from the port" constituted irreparable injury, and this Court finds that the same would undeniably result in Hampton Roads without the maintenance of the status quo that existed before August 1, 1984. To understand the irreparable harm Hampton Roads would suffer under the ILA position, one need only compare how the issue would effect Baltimore, Maryland just up the Chesapeake Bay. Under the local Baltimore contract, members of the container gang perform the work of lashing and unlashing of containers. In Hampton Roads, the container gang will perform no lashing when lashing or unlashing is required. A lashing gang with a minimum of a header and six men must be utilized. Thus, seven more men must be brought on the job in Hampton Roads by the local agreement to perform lashing.

It can then be easily seen that Baltimore could order four more drivers, as is the custom of some of the em-

ployers in Hampton Roads, making a crew of 24 and out of this crew of 24 have all the lashing done. In Hampton Roads, if one wanted four more drivers and had to have lashing performed, one would need a crew of 31. This would include seven more men for a period of a minimum of four hours at a cost of $35.00 per hour per man instead of three-man differential favoring Baltimore which existed on July 31, 1984.

The change of the drivers alone would cause a differentiation of $5.00 per container which for 400 containers would be $2,000.00, plus any extra charges for the lashing crew. This indeed is a substantial differentiation. Presently, the ports to the south are utilizing the Norfolk Agreement, which Norfolk itself can no longer use according to the ILA. There is no question about irreparable injury in this instance. This Court further adopts the findings of August 2, 1984, and the findings it found on August 8, 1984, and this opinion is merely an elaboration of those findings.

In conclusion, this Court finds that the ILA, under the provisions of the Hampton Roads contract, must arbitrate this issue rather than attempt to engage in a strike in Hampton Roads. ILA's reliance on the Emergency Panel determination is not well taken and this Court finds that the panel decided a local grievance applying to the port of Galveston, Texas. This Court further finds that at no time was the Hampton Roads Shipping Association "charged" in accordance with the requirements of Clause 6(A) of the Emergency Panel arbitration provision. The mere reading of the Emergency Panel arbitration provision provides in subparagraph (E) that the "ILA shall have the right to refuse to render service to any carrier or direct employer (but only with respect to the carrier *charged*) who, after a determination under Steps 1 and 2 above, have been found to have violated the provisions . . . ." Third, this Court further finds that Paragraph (F)

respecting "charges of alleged violations involving more than one port" does not apply because the paragraph deals only with multi-port issues and bypasses any local grievance step. The notice, the charge and the minutes all apply to Galveston, Texas. It mentioned nothing about the word "driver" but referred to "heavy lift operators" or "port-o-packer operators". At no time was there any indication of "drivers" and at no time was there any indication that any more than one port was involved. At no time was there any indication that HRSA or Norfolk, Virginia, or anything or any place or anybody other than Galveston, Texas and Union Local 20 of the ILA were involved.

This Court was assured by the ILA that it would hear this grievance on August 16, 1984 in New York before the same panel but it is unknown what was or was not done at that hearing.

Lastly, arbitration is to be preferred over litigation and that a resolution without resort to a strike benefits not only parties but also the public. The status quo of August 1, 1984 should be maintained until this problem is finally resolved. It does not appear that a further hearing in this Court would present any other evidence in conflict with that already offered and neither party has requested an immediate trial which this Court is willing to provide.

/s/ ROBERT G. DOUMAR
United States District Judge

At Norfolk, Virginia

August 24th, 1984

Appendix C

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1834

HAMPTON ROADS SHIPPING ASSOCIATION, on behalf of its members, jointly and severally,

Appellees,

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL-CIO), and its Affiliated Locals in the Ports of Hampton Roads,

LOCAL 846, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

LOCAL 970, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

LOCAL 1248, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Appellants.

SOUTH CAROLINA STEVEDORES ASSOC.,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same

is hereby, affirmed in part; and vacated in part. The case is remanded to the United States District Court for the Eastern District of Virginia at Norfolk, for further proceedings consistent with the opinion filed herewith.

/s/ JOHN M. GREACEN
Clerk

A True Copy, Teste:
John M. Greacen, Clerk
By /s/ SUE ELLEN SOUTHARD
Deputy Clerk

Appendix D

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1834

HAMPTON ROADS SHIPPING ASSOCIATION on behalf of its members, jointly and severally,

Appellee,

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL-CIO), and its affiliated Locals in the Ports of Hampton Roads,

LOCAL 846, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO;

LOCAL 970, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO;

LOCAL 1248, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Appellants.

SOUTH CAROLINA STEVEDORES ASSOC.,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, District Court.

Upon consideration of the appellants' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Order Denying Rehearing

Entered at the direction of Judge Butzner for a panel consisting of Judge Winter, Judge Sprouse and Judge Butzner.

For the Court,

JOHN M. GREACEN
Clerk

Appendix E

Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-2442

WEST GULF MARITIME ASSOCIATION,

Plaintiff-Appellee,

versus

ILA DEEP SEA LOCAL 24, SOUTH ATLANTIC AND GULF COAST DISTRICT OF THE ILA; AFL-CIO, ETC., ET AL.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(January 7, 1985)

Before GARZA, RANDALL, and TATE, Circuit Judges.

TATE, Circuit Judge:

The defendant longshoremen's labor unions appeal from a preliminary injunction entered by the United States District Court for the Southern District of Texas. 28 U.S.C. § 1292(a). The injunction restrains work stoppage and compels local arbitration of a dispute concerning the number of

longshoring workers required to load and unload cargo containers. The district court entered the injunction on the authority of Boys Markets, Inc. v. Retail Clerk's Union, 398 U.S. 235, 90 S.Ct. 1583 (1970), which states a "limited" exception to the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104, and permits an injunction restraining work stoppage where a union has agreed to arbitrate the grievance underlying the work stoppage. *See* Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702, 707-09, 102 S.Ct. 2673, 2678-79 (1982).

We hold that the district court should have dismissed or stayed the action or should have transferred it to the United States District Court for the Southern District of New York where a pending action involved closely related issues. Accordingly, we vacate the injunction and remand.

Facts

The "containerization" issue has confronted the shipping industry for some time. Containers are metal boxes in which matter to be shipped is placed to facilitate easy handling in the loading and unloading process. Because containers reduce handling by longshoremen during loading and unloading of vessels, containerization threatens to reduce the number of longshoring jobs.

Through collective bargaining, labor and management have attempted to solve the problem posed by containerization. Paragraph 5 of an agreement known as the containerization agreement (part of a master contract between the International Longshoremen's Association (ILA) and various employer associations, including the plaintiff below, West Gulf) provides:

> The minimum number of the container gang used in loading or unloading containers to or from container ships shall consist of 18 men plus two drivers.

The parties agree that paragraph 5 requires employers to "order" from the union no less than twenty workers when containers are to be loaded or unloaded.

The parties do dispute, however, whether paragraph 5 permits employers to use more than two workers in the twenty-worker unit as drivers. The union contends that, if an employer needs more than two drivers, it must order workers in addition to the twenty-worker unit. The employers of the Association, however, contend that workers within the "18 men" part of the twenty-worker unit may be used as drivers.

Such containerization disputes under the master contract are to be resolved by an entity known as the Emergency Hearing Panel. In the parties' so-called Tampa agreement, at paragraph IV, they provide:

> In order to correct all violations and to resolve all grievances it is agreed that an emergency panel of an equal number of representatives from each side shall be named by the President of the ILA and by Management for the purpose of hearing and resolving all cases relating to the Containerization Agreement, on an emergency basis at the earliest possible moment. It is agreed that the first of such meetings shall be convened in New York not later than the month of May, 1981. The Committee shall hold such further meetings, on an emergency and expedited basis, to the fullest extent necessary to resolve the above issues.

Further, the parties provide in an agreement known as the Hollywood agreement, at paragraph 6, for specific procedures to govern the Emergency Hearing Panel. Paragraphs 6(A) and 6(B) provide that alleged violations of the containerization agreement are "heard" at the local port under local procedures and, if there is failure to agree or one party wishes to appeal, the matter is "referred" to

the Emergency Hearing Panel. Pursuant to paragraph 6(F), "[c]harges of alleged violations of the Master Agreement involving more than one port shall be referred directly to the Management-ILA Emergency Hearing Panel for final determination." Paragraph 6(C) provides that the Emergency Panel is constituted of an equal number of labor and management representatives and that a "majority vote" of the panel "shall be final and binding and shall constitute an enforceable award." Under Paragraph 6(C), if the panel deadlocks, a "third party" (a neutral arbitrator) is selected "to break the deadlock". Finally, paragraph 6(E) explains when the right to stop work or strike exists:

> The ILA shall have the right to refuse to render service to any carrier or direct employer (but only with respect to the carrier charged) who, after a determination under Steps One and Two above [referring apparently to paragraphs 6(A), 6(B) and 6(F)] has been found to have violated the provisions of the said Master Agreement, and who refuses to abide by the decisions rendered under Steps One and Two above, and the provisions of any no-strike clause shall be rendered inapplicable in such situation.

In this case, the union referred the dispute concerning the meaning of "18 men plus two drivers" to the Emergency Hearing Panel at its meeting on June 12, 1984. At the meeting, a union representative made a motion "that the gang size shall be 18 plus two with drivers added to the twenty." The nine union members present voted in favor of the motion. Eight of the management representatives voted against the motion, but the minutes show that one of these representatives was an alternate, not a regular panel member, and "it was subsequently determined that alternates were not entitled to cast a vote." As to the

ninth management representative, one Costello, the minutes state: "When polled, Mr. Costello stated that he would abstain from voting. However, he subsequently stated that he would stand by the Master Contract. This was considered to be a vote in favor of the motion."

According to the minutes, the panel's co-chairman, Dickman, a management representative, declared that a "motion has been made and carried." In line with this ruling by Dickman, the minutes state:

> RESOLVED: That in accordance with the provisions of the Master Collective Bargaining Agreement, negotiated by and agreed to by the parties, the minimum size of a container gang shall be 18 men plus two drivers and that should additional drivers be required, such drivers are to be drawn from outside the gang and shall not be part of the regular 20-man gang.

The panel's vote and the resulting resolution immediately became the subject of vigorous dispute. Management took, and continues to take, the position that the vote was invalid because allegedly, among other reasons, (1) local dispute resolution procedures were not followed prior to consideration by the Emergency Hearing Panel, (2) the agenda notice did not sufficiently describe the matter purportedly resolved by the panel's vote and resolution, (3) the agenda notice was not given at least five days before the panel's meeting, (4) the union's motion may not have carried because the vote of management's alternate was not counted, and (5) Costello's abstention, if that is what it was, did not give the union the majority required for a panel decision because it did not give the union more than one-half the available votes.

To settle the controversy about the vote and the ensuing resolution, the ILA filed on June 28, 1984 in the United States District Court for the Southern District of New

York (Judge Sand) an action against West Gulf (the present plaintiff) to enforce the decision of the Emergency Hearing Panel. West Gulf responded by moving to dismiss for lack of personal jurisdiction or, alternatively, to transfer the action to the Southern District of Texas. On August 9, 1984, the district court in New York ruled that it had jurisdiction of West Gulf and denied West Gulf's motion to transfer the action to Texas.

While the motions to dismiss and transfer were pending in New York, West Gulf filed on August 3, 1984 in the Southern District of Texas the present action, from which this appeal arises. It named the ILA and its regional and local affiliates as defendants and, with respect to each of them, sought declaratory and injunctive relief. West Gulf specifically sought declarations that the decision of the Emergency Hearing Panel was invalid for the reasons outlined above and that its local practices did not violate the "18 men plus two drivers" provision of the master contract. West Gulf also sought by its complaint an injunction restraining the union defendants from refusing to fill orders for longshoremen made by employers who would not abide by the decision of the Emergency Hearing Panel (*i.e.*, enjoining a work stoppage) and requiring the union defendants to arbitrate at the local level the dispute about the number of drivers who could be taken out of a twenty-worker gang. On the day West Gulf filed its complaint, August 3, the district court issued an ex parte temporary restraining order concerning the work stoppage.

On August 13, 1984—four days after the district court in New York denied West Gulf's motion to transfer that action to the Southern District of Texas—West Gulf filed in the Southern District of Texas its application for a preliminary injunction, and the district court heard and granted the application that day. The application alleged that on August 3, 1984 ILA Deep Sea Local 24 refused to unload containers on a vessel docked at the Port of Houston

by refusing to fill an employer's order for a "container gang." According to the application, the local union refused to fill the order because the employer was in violation of the June 12, 1984 decision of the Emergency Hearing Panel.

West Gulf's application for a preliminary injunction asserted that "[t]he underlying dispute concerns the number of men in a 20-man container gang who may be utilized as drivers." West Gulf contended that the union's interpretation of the "20-man" provision of the master contract's containerization agreement is erroneous and that, in any event, the union is required to resolve the dispute through the Emergency Hearing Panel process, a process that allegedly had not been followed because the decision of the Emergency Hearing Panel was invalid. West Gulf also contended that the union's interpretation of the corresponding "20-man" provision in the relevant local contract is erroneous for the same reasons that applied to the master contract and that, in any event, the local contract differs from the master contract and authorizes the practice of taking more than two drivers out of a twenty-worker order. The local contract has its own arbitration procedure, which differs from the Emergency Hearing Panel procedure, and West Gulf contended that the local union violated that agreement by refusing to fill labor orders before completion of arbitration under the local procedure.

At the preliminary injunction hearing, West Gulf took the position that "it is inherent within the court's equitable powers to essentially preserve the status quo until such time as these issues are decided either by this court or by the Southern District of New York." West Gulf's counsel further explained its position:

> I think the key to this whole thing is what the court pointed out that what we need to do is preserve the status quo until such time as the final decision has

> been made by the court until, number one, if Judge Sand in the Southern District of New York action decides that the decision of the Emergency Panel was null and void because of deficiencies, that is going to end the matter.

The union defendants urged that West Gulf's Texas action should be dismissed because the issues it presented should be resolved by Judge Sand in the New York action:

> There is an action pending in the United States District Court for the Southern District of New York. The title of the action is International Longshoremen's Association versus West Gulf Maritime Association. It is civil action No. 84-SD-4594. That action was filed prior to the action which is pending in this court.
>
> In that case, the International Longshoremen's Association has brought a petition to confirm and enforce the arbitration award which is the basis of the present action here.
>
> In that case, the West Gulf Maritime Association has raised all of the procedural objections which they are asserting before your honor in support of their application for injunctive relief.
>
> Now, in view of the prior pendency of the New York federal action, we would ask Your Honor to dismiss the present action.

The district judge rejected the motion to dismiss West Gulf's action in Texas on the theory that West Gulf had as much right to file in Texas as the ILA had to file in New York. "Everybody wants to be on their home turf. And if we are going to talk about forum shopping, I think it comes out a draw." When informed that there would be "a risk of conflicting decisions" if the court were "to make any

findings whatsoever," the district court responded: "Happens all the time." Counsel for the union defendants vigorously responded that the ordinary rule to prevent such conflicts requires the dismissal of a second-filed action where a previously filed action can resolve the important issues in both actions. The district court rejected this position:

> Well, I am going to enter the preliminary injunction....
>
> I want, however, to be certain that everyone understands that developments before Judge Sand that would affect this order in any fashion, let me know. And if what he does would indicate that this order ought to be dissolved I will act on it very, very quickly. And I am doing this only to maintain the status quo.
>
> I feel that on the questions that are before Judge Sand, as I understand it, as to the validity as far as West Gulf is concerned of the decision of the Emergency Panel, that is before him. And I suppose what I am doing is not second guessing, but first guessing that what he is going to say they are entitled to arbitrate the matter in a different fashion than what they did. I am totally—I may be totally wrong about that, but all I am seeking to do by this order is maintain the status quo until those matters are determined. And I am saying that I think that the West Gulf Association is likely to succeed on that. And that is an arbitrable issue that ought to be done.

Though the entire hearing in the district court focused on the validity of the Emergency Hearing Panel decision and on the meaning of the "18 men plus two drivers" provision of the master contract's containerization agreement, the district court's preliminary injunction, drafted by West Gulf before the hearing, focused entirely on the local con-

tract between West Gulf and the ILA local affiliate. The injunction finds as a fact that the union's refusal to fill container gang orders is a breach of "a provision" in the local agreement, though which provision is not specified. It finds that "the dispute causing the breach" is subject to the agreement's arbitration procedures, but it does not specify what the dispute is. The injunction indefinitely restrains the union defendants from "any work stoppage," and it is not limited to work stoppages regarding arbitrable disputes. Finally, the injunction commands all of the union defendants, not just those party to the local agreement, to submit to arbitration under the terms of the local agreement "the dispute concerning the makeup and size of container gangs."

I. *Labor Injunction Principles*

The Norris-LaGuardia Act, 29 U.S.C. § 104(a), forbids courts to enjoin work stoppages "in any case involving or growing out of any labor dispute." *See* Jacksonville Maritime Ass'n v. International Longshoremen's Ass'n, 571 F.2d 319, 323 (5th Cir. 1978). The Labor Management Relations Act, 29 U.S.C. § 185(a), however, permits courts to enjoin breaches of collective bargaining agreements. *Id.* The Supreme Court has found in the Labor Management Relations Act a narrow exception to the strictures of the Norris-LaGuardia Act: where labor and management have, by collectively bargained agreement, contracted to resolve certain disputes by arbitration or other informal dispute resolution mechanism, a union may be enjoined from stopping work until the dispute giving rise to the stoppage has been arbitrated or otherwise resolved in accordance with the parties' agreement. Boys Markets, Inc. v. Retail Clerk's Union, 398 U.S. 235, 90 S.Ct. 1583 (1970). In *Boys Markets,* the Supreme Court described its holding as a "narrow one"

not intended to "undermine the vitality of the Norris-LaGuardia Act." *Id.* at 253, 90 S.Ct. at 1594.

The Supreme Court twice has emphasized the narrow contours of the *Boys Markets* exception to Norris-LaGuardia's general anti-injunction rule. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702, 102 S.Ct. 2673 (1982); Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 96 S.Ct. 3141 (1976). In *Jacksonville Bulk Terminals* and *Buffalo Forge*, the Court emphasized in particular that, to be subject to injunction, a strike actually must be over an arbitrable dispute.

Because the *Boys Markets* injunction depends on the nexus between a work stoppage and an arbitrable dispute, it is essential to the validity of such an injunction that the injunction compel arbitration in addition to restraining work stoppage. "[T]he employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike." Boys Markets, Inc. v. Retail Clerk's Union, 398 U.S. 235, 254, 90 S.Ct. 1583, 1594 (1970), *quoting*, Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228, 82 S.Ct. 1328, 1346 (1962) (dissent). Indeed, this concept is at the heart of the holdings in *Jacksonville Bulk Terminals* and *Buffalo Forge;* the dispute causing work to be stopped must be arbitrable because an injunction restraining the stoppage may issue only if it compels arbitration of the underlying dispute.

II. *Dispute Underlying Work Stoppage: Local or Master Contract?*

The district court compelled arbitration under provisions of the local contract. Certainly the local contract—to which the ILA was not a party—contains a provision relevant to the general container gang issue. Just as certainly, West Gulf contends the union defendants were in breach of the

provision and may be entitled to an arbitration award declaring the breach, something about which we express no opinion. But the work stoppage in this case manifestly was not over a dispute about the meaning of the container gang provision of the local contract. To say that management alleges a breach of the local contract is not to say that the unions have stopped work over a dispute about that issue.

The refusal to fill orders for container gangs involved a dispute about the meaning of the "18 men plus two drivers" provision of the master contract's containerization provision. The application for a preliminary injunction itself demonstrates that the union, upon refusing to fill labor orders, consistently indicated its reliance on the decision of the Emergency Hearing Panel concerning that provision of the master contract's containerization provision. The entire discussion at the preliminary injunction hearing recognized as much in its focus on the validity of the Emergency Hearing Panel's decision. There is no way to view the dispute in this case realistically or meaningfully and to see it as other than a dispute concerning the validity of the Emergency Hearing Panel's decision and the obligation of affected employers to conform to its determination of the meaning of a key master contract term. *Cf.* Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702, 720-23, 102 S.Ct. 2673, 2685-86 (1982) (taking practical view of underlying dispute causing strike).

The district court erred, therefore, in ordering arbitration under the local contract as part of its *Boys Markets* injunction. The essential issue is instead whether it was proper to enjoin the work stoppage in light of the arbitration provisions in the master contract agreements. The union contends that these agreements give it the right to stop work after a determination by the Emergency Hearing Panel. West Gulf contends that a work stoppage prior to judicial enforcement of the decision of the Emergency

Hearing Panel would frustrate the contemplated arbitration process and therefore be in violation of the applicable no-strike provisions contained in the master contract documents. We believe that the unions have the better of this disagreement, *assuming* that the decision of the Emergency Hearing Panel is valid.

The general rule in this circuit is that "a *Boys Markets* injunction may continue in force pending judicial enforcement of the subsidiary arbitral award." Sea-Land Service, Inc. v. International Longshoremen's Ass'n, 625 F.2d 38, 42 (5th Cir. 1980). *Sea-Land* states, however, that this general rule applies "absent express agreement to contrary." *Id.* The master contract agreements, entered into after the *Sea-Land* decision, contain such express agreement, set forth above, to permit work stoppage after an Emergency Hearing Panel Determination or, if the panel deadlocks, after the ensuing arbitral award.

West Gulf strenuously asserts that, as Paragraph 6(E) refers to the completion of step 1 (local procedures) and step 2 (the Emergency Hearing Panel and possibly a neutral arbitrator if there is deadlock), the failure to complete local dispute resolution in this case renders Paragraph 6(E) authorization of immediate work stoppage inapplicable. The argument is considerably more technical than meaningful. The fact is that the relevant dispute was presented to and resolved by the Emergency Hearing Panel. *See* San Antonio Newspaper Guild v. San Antonio Light Division, 481 F.2d 821, 825 (5th Cir. 1973). Whatever merit there might have been to West Gulf's contention that local arbitration procedures were not exhausted or that items at issue were governed by the local agreement and not the master contract, these issues were the subject of the dispute when referred to the Emergency Hearing Panel. West Gulf, having participated in the arbitral processes under the master contract before that panel, is subject to the usual principle of arbitration law that

whether a matter is arbitrable under the agreement is for the arbitrator, not the courts. Moreover, West Gulf actually appeared in the New York district court proceedings brought to enforce the panel award against it; and its proper forum, *see* text at III, *infra*, to litigate these contentions was in that district court (as it in fact attempted to do, *see* note 7, *see also* note 5).

Further, if either party had prevailed under a full utilization of local procedures, the other undoubtedly would have referred the matter to the Emergency Hearing Panel. The matter would likewise have reached the panel in the event of deadlock at the local level. Moreover, paragraph 6(F) contemplates immediate referral of containerization disputes to the panel in the event of alleged violations at more than one port. The containerization dispute considered by the Emergency Hearing Panel involved every port subject to the jurisdiction of the panel. In short, the matter probably could have been referred directly to the panel.

In any event, thus, the dispute would have ended up before the panel, with the panel actually reaching a decision on the matter. Because the core intent of Paragraph 6(E) plainly is to authorize work stoppages after a panel decision, in these circumstances the union would be entitled to stop work if the decision of the panel was valid.

The controlling issue as to the injunction from which appeal has been taken is the validity of the Emergency Hearing Panel decision. This is what the parties and the district court recognized in their comments at the preliminary injunction hearing below. And, in our view, this is why West Gulf's declaratory and injunctive action should have been dismissed, stayed, or transferred to the Southern District of New York, as we explain next.

III. *Comity and Dismissal, Transfer, or Stay*

The essential facts that guide our ultimate decision in this case are these: the New York action was filed over one month before the Texas action; the New York action involved petitions to enforce and vacate the decision of the Emergency Hearing Panel and therefore concerned the validity of that decision; the validity (or not) of the Emergency Hearing Panel decision was at the heart of West Gulf's entitlement to the declaratory and injunctive relief it requested in the Texas action; the Emergency Hearing Panel sat in New York; the containerization dispute before the panel affected the entire Atlantic and Gulf coasts; and Judge Sand in New York considered and denied a motion to transfer the New York action to Texas four days before the issuance of the preliminary injunction in this case. On these facts, the denial of the union defendant's request to dismiss the Texas action was an abuse of discretion.

The federal courts long have recognized that the principle of comity requires federal district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other's affairs. *E.g.*, Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 72 S.Ct. 219 (1952); Covell v. Heyman, 111 U.S. 176, 182 (1884). "As between federal district courts, . . . the general principle is to avoid duplicative litigation." Colorado River Water Conservation District v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246 (1976) (dictum). The concern manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result. *E.g.*, *id.* at 818-20, 96 S.Ct. at 1246-48; Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93 (9th Cir. 1982); Washington Metropolitan Area Transit Authority v. Ragonese, 617 F.2d 828 (D.C. Cir. 1980); Calvert Fire Insurance Co. v. American Mutual Reinsurance Co., 600 F.2d 1228 (7th Cir. 1979); Gregory-Portland Independent

School District v. Texas Education Agency, 576 F.2d 81 (5th Cir. 1978); Mann Manufacturing, Inc. v. Hortex, Inc., 439 F.2d 403 (5th Cir. 1971). To avoid these ills, a district court may dismiss an action where the issues presented can be resolved in an earlier-filed action pending in another district court.[1] In particular, "[a] court may . . . in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere." Abbott Laboratories v. Gardner, 387 U.S. 136, 155, 87 S.Ct. 1507, 1519 (1967). *See* Bergh v. Washington, 535 F.2d 505, 507 (9th Cir. 1976); National Health Federation v. Weinberger, 518 F.2d 711, 712 (7th Cir. 1975).[2]

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[1] In addition to outright dismissal, it sometimes may be appropriate to transfer the action or to stay it. A stay may, for example, be appropriate to permit the court of first filing to rule on a motion to transfer. If that court transfers the first-filed action, the stay could be lifted and the actions consolidated. If the transfer is denied, however, the stay could be lifted and the second-filed action dismissed or transferred.

[2] The standard of appellate review of district court decisions to accept or decline jurisdiction over declaratory and injunctive actions when comity issues are at stake is not entirely clear. Some authority holds that the district court decision is discretionary; hence we would review only for abuse of that discretion. *See* Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183-84, 72 S.Ct. 219, 221 (1952); Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93, 95 n.2 (9th Cir. 1982). Other authority indicates that, while the district court's decision is one of discretion, "we may exercise our own judgment in determining whether a suit for declaratory and injunctive relief should be entertained." National Health Federation v. Weinberger, 518 F.2d 711, 712 (7th Cir. 1975). Our own important federal comity decisions do not address the standard of review, though their language indicates that the rules discussed therein severely limit the district court's discretion. Gregory-Portland Independent School District v. Texas Education Agency, 576 F.2d 81 (5th Cir. 1978); Mann Manufacturing, Inc. v. Hortex, Inc., 439 F.2d 403 (5th Cir. 1971). We have no occasion to settle here on the standard of review because of our holding that, even if the district court had a broad discretion to resolve the comity issue it confronted, it abused that discretion in permitting the Texas action to proceed and in issuing the injunction.

The District of Columbia Circuit has affirmed dismissal of a second-filed action where the first-filed action presented "a closely related question." Washington Metropolitan Area Transit Authority v. Ragonese, 617 F.2d 828, 830 (D.C. Cir. 1980). The transit authority terminated a contractor for default, and a board designated by contract to decide such disputes upheld the termination and awarded the transit authority damages. *Id.* at 829. The contractor then sued the transit authority in the Eastern District of Virginia in a challenge to the board's decision. *Id.* at 830. The transit authority next sued the contractor in the District of the District of Columbia, alleging that it was entitled to immediate payment of board-awarded damages even though judicial review proceedings were pending. *Id.* In affirming the dismissal of the District of Columbia action, the appeals court noted that the District of Columbia action presented "a closely related question that could be raised in the Virginia proceedings." *Id.* The court held: "Considerations of comity and orderly administration of justice dictate that two courts of equal authority should not hear the same case simultaneously." *Id. See* Columbia Plaza Corp. v. Security National Bank, 525 F.2d 620 (D.C. Cir. 1975).

The Ninth Circuit twice has reached a similar result. In Bergh v. Washington, 535 F.2d 505, 506-07 (9th Cir. 1976), the court affirmed dismissal of an action aimed at enjoining, among other things, the State of Washington from issuing certain fishing regulations; in part that affirmance was grounded on the existence in another district of an action in which the validity of those regulations was in issue. And in Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982), the court affirmed dismissal of a second-filed action for a declaration of non-infringement of a patent where a first-filed action in another district sought damages for patent infringement and therefore raised identical issues, stating: "Normally sound judicial admin-

istration would indicate that when two identical actions are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit and no purpose would be served by proceeding with a second action."

This circuit has recognized and applied these comity principles that underlie the first-filed rule. Mann Manufacturing, Inc. v. Hortex, Inc., 439 F.2d 403 (5th Cir. 1971). In *Mann,* we held that the court with "prior jurisdiction over the common subject matter" should resolve all issues presented in related actions. *Id.* at 408. At issue were actions in New York and Texas; in New York party A sued party B for a declaration of non-infringement of a patent, and in Texas party B sued party A for damages for infringement of a related patent. *Id.* at 405-06. The New York court earlier had enjoined B from suing in Texas on the same patent in issue in New York, and when B sued in Texas on the related patent, A filed a motion in New York to enjoin B from prosecuting that action in Texas. *Id.* Upon B's motion, the court in Texas enjoined A from pursuing its injunction application in New York. *Id.* Noting that the New York court earlier had denied a motion to transfer the New York action to Texas, we reversed the Texas court's entry of the injunction and indicated that it was the New York court that should decide whether to try all issues relating to both patents. *Id.* at 407-08.

> Once the likelihood of substantial overlap between the two suits had been demonstrated, it was no longer up to the court in Texas to resolve the question of whether both should be allowed to proceed. By virtue of its prior jurisdiction over the common subject matter and its injunction of suit involving the subject matter in Texas, the ultimate determination of whether there *actually* was a substantial overlap requiring con-

> solidation of the two suits in New York belonged to the United States District Court in New York.

Id. at 408.

> [R]egardless of whether or not the suits here are identical, if they overlap on the substantive issues, the cases would be required to be consolidated in New York, the jurisdiction first seized of the issues.

Id. at 408 n.6. *See* Gregory-Portland Independent School District v. Texas Education Agency, 576 F.2d 81 (5th Cir. 1978).

Our holding and discussion in *Mann* make plain that in this case the district court should have stayed, dismissed, or transferred West Gulf's action. The union defendants frankly advised the district court of the nature and circumstances of the New York action, and the parties and the court appeared to appreciate that the core issue in the New York action was the same as the core issue in the Texas action. The district court implicitly indicated that it would not resolve the declaratory judgment or *permanent* injunction issue in the Texas action, leaving the questions they involved to Judge Sand. Nevertheless, the district court issued a *preliminary* injunction in the Texas action, an action in which it contemplated no further orders or decisions, on the apparent theory that the preliminary injunction would not affect the New York action and, indeed, would preserve the status quo so that a decision there would be meaningful.

The central point, however, is that it was up to Judge Sand to determine whether an injunction was necessary. He had before him for over one month the same issues the district court in this case had only days to consider. Judge Sand was in the better position to know what was needed, if anything, to preserve the status quo, as well as the likelihood of the parties to prevail that underlies issuance or not of a preliminary injunction.

Inevitably the district court's injunction intruded on Judge Sand's authority.[3] Despite the present district court's laudable willingness to avoid interference with the New York action, its finding that West Gulf is likely to succeed in fact intruded upon the New York court's decisional authority as to whether or not to grant injunctive or other relief arising out of the containerization dispute. The Texas judge's action is especially problematic in light of Judge Sand's earlier denial of the motion to transfer the New York action to Texas.[4]

The present Texas injunction also made more likely the piecemeal resolution of a difficult issue. The labor controversy at issue here exists in the First, Second, Third, Fourth, Fifth, and Eleventh Circuits. Within some of these circuits, the issue exists in multiple districts. It would be unwise to resolve separately in each of the affected districts in each of these circuits the question of issuing an injunction to prevent work stoppages relating to the Emergency Hearing Panel decision. The district court in New York is in a position to render a unitary decision as part of its consideration of the validity of the Emergency Hearing Panel decision. *See* Colorado River Water Con-

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[3] As regards a *Boys Markets* labor injunction, there exists a particularly close relationship between the issue of a preliminary injunction and the ultimate merits. Such an injunction, as indicated above, must be accompanied by an order to arbitrate. In this case, that would have required an order compelling further consideration by the Emergency Hearing Panel or a neutral arbitrator. In practical effect, that is essentially what was at stake in New York: had the dispute about container gangs been resolved by the Emergency Hearing Panel or must it be taken further along in the process? To compel the parties to go back to the Emergency Hearing Panel or to go to a neutral arbitrator would have constituted an implicit rejection of the validity of the initial Emergency Hearing Panel decision. Yet it is clear that this matter, as the district court recognized, was for Judge Sand to resolve.

[4] *See also* note 7, below.

servation District v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976) (affirming dismissal of federal action because pending state action would permit unified adjudication of rights in issue); Zambrano v. Califano, 651 F.2d 842 (2d Cir. 1982) (affirming dismissal of declaratory and injunctive action where, among other things, other litigation would provide "a national solution to the problem").[5]

A different analysis leads to disharmony among the federal courts. The union defendants, after notice of the tem-

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[5] West Gulf could have asserted its claim for injunctive relief as a counterclaim in the New York action. Fed.R.Civ.P. 13; Montgomery Elevator Co. v. Building Engineering Services Co., 730 F.2d 377 (5th Cir. 1984) (defining compulsory counterclaim). *See* Warshawsky & Co. v. Arcata National Corp., 552 F.2d 1257 (7th Cir. 1977) (court of first filing should enjoin parties from proceeding in court of second filing on counterclaim which should have been asserted in court of first filing); Columbia Plaza Corp. v. Security National Bank, 525 F.2d 620 (D.C. Cir. 1975) (same); American Civil Liberties Union v. Laird, 463 F.2d 499 (7th Cir. 1972) (Stevens, J.) (if issues in two actions not identical, parties can amend pleadings in the first action).

West Gulf argues, however, that it could not meaningfully seek declaratory and injunctive remedies in New York because all of the union defendants were not parties to the action in New York. Only the ILA was a party there. This is not a reason to deny the simultaneous pendency of two essentially identical actions. First, the work stoppage in issue arose over a directive from the ILA concerning the decision of the Emergency Hearing Panel, and an injunction against the ILA would afford West Gulf a basis for complete relief on its present injunction claim. Second, the other union defendants probably can be made parties to the New York court action in litigation concerning the Emergency Hearing Panel decision; they had sent the dispute that arose in Texas to the Emergency Hearing Panel for resolution in New York, and, so far as litigation concerning the panel's decision is concerned, it appears that a New York court would have jurisdiction over the local unions. Finally, the local union defendants are in privity with the ILA and working in concert with the ILA and could be bound by any injunction the district court in New York might issue. *Cf.* National Health Federation v. Weinberger, 518 F.2d 711 (7th Cir. 1975) (second-filed action should be dismissed even though different plaintiffs involved in first-filed action).

porary restraining order issued in the Southern District of Texas, could have sought in the New York action an injunction prohibiting West Gulf from proceeding with its motion for a preliminary injunction in the Texas action. Considerable authority supports such a motion. *E.g.*, Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 552 F.2d 601 (5th Cir. 1977); Warshawsky & Co. v. Arcata National Corp., 552 F.2d 1257 (7th Cir. 1977); Columbia Plaza Corp. v. Security National Bank, 525 F.2d 620 (D.C. Cir. 1975). Yet it seems clearly better for parties to rely on the discretion of the court in the second-filed action to prevent duplicative litigation, rather than to require them to seek an injunction in another court to prevent such duplicative litigation.[6]

Events that occurred after the issuance of the injunction confirm the wisdom of deferring to the court of first filing. Judge Sand ultimately ruled that he could not discern the validity of the award and remanded the matter to the Emergency Hearing Panel (and thereafter, in the event of deadlock, to an arbitrator) for clarification of the panel's June 12, 1984 vote. In doing so, Judge Sand retained jurisdiction over renewed litigation after a decision by the panel or an arbitrator. The remand order is now on appeal to the Second Circuit.[7]

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[6] As in *Mann*, we distinguish between the granting of the temporary restraining order. West Gulf requested the restraining order ex parte and without mention in its moving papers of the New York action. At that time, a ship sat in the Port of Houston unloaded, and the district court could not have known of the comity concerns that required dismissal of West Gulf's action or other appropriate order.

[7] Before dismissing the New York action, Judge Sand also had before him West Gulf's oral application for a preliminary injunction of the same tenor as the one issued below. Judge Sand took the question under submission, but did *not* grant the injunction. *See* United States v. American Radiator & Standard Sanitary Corp., 388 F.2d 201, 203-04 (3d Cir. 1967).

The Emergency Hearing Panel deadlocked on the meaning of the June 12, 1984 vote. Thereafter—on December 10, 1984—an arbitrator decided that the union's containerization motion had carried with the required majority vote and resulted in "a final and binding and enforceable award."

Thus, we confront (1) a panel decision that has not been vacated by a court, (2) a decision by Judge Sand expressing uncertainty about the panel's decision, but denying transfer of litigation to Texas and retaining jurisdiction over renewed litigation related to the panel's decision, (3) a Second Circuit appeal involving the panel's decision and Judge Sand's remand order, and (4) an arbitrator's decision that the panel's decision constitutes an enforceable award.

To review the merits of the injunction in this case, we unavoidably would pass on the merits of Judge Sand's decision and the arbitrator's decision and intrude into the issues to be decided by the Second Circuit. We believe ourselves constrained from deciding the merit issues so presented by the same principles of comity that made inappropriate the present district court's issuance of a preliminary injunction involving the merits of the action previously filed in and then pending before the district court in New York.[8]

Conclusion

For the foregoing reasons, the preliminary injunction is vacated and the case is remanded for entry of an order of stay, transfer, or dismissal, consistent with this opinion.

VACATED and REMANDED.

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[8] We recognize that the Fourth Circuit has affirmed a similar injunction. Hampton Roads Shipping Ass'n v. International Longshoremen's Ass'n, 746 F.2d 1015, (4th Cir. 1984). *Hampton Roads* does not mention the comity issue, and it cannot be discerned if the parties raised the issue. It clearly is presented as an issue in this case.

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In the Supreme Court of the United States

October Term, 1984

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 846,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 970,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1248,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

v.

HAMPTON ROADS SHIPPING ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Docket No. 84-1314

IN THE SUPREME COURT OF THE UNITED STATES

October Term,

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 846, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 970, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1248, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

v.

HAMPTON ROADS SHIPPING ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, the Hampton Roads Shipping Association (HRSA), by counsel, prays that this Court deny the issuance of a writ of certiorari sought by Petitioners and not review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on October 23, 1984.

OPINIONS BELOW

Petitioner has properly cited and included in its Appendix (hereinafter cited as Pet. App.) the decisions of the Court of Appeals for the Fourth Circuit and District Court, and such decision and citations will not be repeated here or attached to Respondent's Appendix (hereinafter cited as Res. App.).

JURISDICTION

Respondent accepts the jurisdictional basis alleged in the Petition for Certiorari, although Respondent does not believe this is a case in which grant of a Writ of Certiorari is appropriate.

STATUTE INVOLVED

Respondent accepts the citation by Petitioners of the statute involved and agrees that this Court's interpretation of the statute under *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), and its progeny is controlling.

STATEMENT OF THE CASE

In early August 1984, Petitioners (hereinafter the ILA or the Union) and its Virginia local unions selectively engaged in a series of work stoppages or strikes in the Hampton Roads area terminals. The work stoppages stemmed from a dispute over the utilization of members of container gangs as drivers. The utilization of members within the gang was the subject of locally negotiated contracts between the ILA and its Virginia locals and the Respondent HRSA and the contracts had been approved by the ILA. The District Court found that since at least 1977 utilization was a local matter, and that the utilization of gang members was different in each of the East and Gulf Ports pursuant to their separate local collective bargaining agreements. The District Court found that the ILA and its locals failed to comply with their local collective bargaining agreements which required them to arbitrate disputes rather than to strike or to engage in work stoppages, and entered a preliminary injunction barring the ILA from such action pending resolution of the dispute pursuant to the procedures under the local collective bargaining agreements.

The ILA appealed to the Court of Appeals for the Fourth Circuit alleging that the dispute was one properly arbitrated pursuant to the ILA Master Contract and before the Management-ILA Emergency Hearing Panel (EHP). The EHP is a

national panel made up of representatives of management and labor who are authorized to attempt to resolve issues involving the master containerization agreement which cannot be resolved on a local basis. The ILA further contended that the EHP had, in fact, previously arbitrated the dispute in question on June 12, 1984, and that accordingly the Union could strike to enforce the "arbitration award" of the EHP in its favor.[1] The Court of Appeals for the Fourth Circuit noted in its opinion that the parties were currently involved in arbitration and judicial proceedings before the EHP, the United States District Court for the Southern District of New York, and in the Court of Appeals for the Second Circuit, and accordingly found that "the district court's order for local arbitration was unnecessary." Pet. App. A at 6. The Court of Appeals, however, upheld the District Court's findings of irreparable injury and public interest, and affirmed the grant of a preliminary injunction noting that:

> As long as the Shipping Association (HRSA) seeks to resolve the dispute through the council in arbitration and judicial proceedings, it is entitled to enforcement of the union's obligation not to strike.

Id. at 6a. The case was remanded to the District Court for modification of its preliminary injunction to bring it in conformity with the Court of Appeals opinion.

The District Court then scheduled the case for a February 25, 1985 trial on whether a permanent injunction would be issued. At the Union's request, *see* Res. App. at 1a, and with the consent of the HRSA, the District Court continued the trial with the stipulation that the matters at issue would be tried or resolved within calendar year 1985. Order of February 6, 1985. Res. App. at 4a. On February 26, 1985 the Union filed a Motion for Leave to Amend and Sumary Judgment in the District Court action. Res. App. at 5a. On February 28, 1985, the Union

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1 The union conceeds that the EHP decision was "not strictly speaking, an arbitration award." Petition for Writ, at 4 fn.5.

consented to holding its motion in abeyance pending proceedings before the Court of Appeals for the Second Circuit. Res. App. at 7a.

Simultaneously with these proceedings, the international Union has been engaged in the arbitration and/or litigation of disputes involving manning and utilization of men within the container gang before the Southern District of New York, the Second Circuit Court of Appeals, the Fifth Circuit Court of Appeals, the EHP and an arbitrator, Mr. Arnold Zack. The Union alleges that all of these actions bear upon, are relevant to, and involve the same issues as those involved in the decision which is before this Court on Petition for grant of a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

1. *The issues involved in this case are not yet ripe for decision by this Court; further decisions and proceedings involving related facts are pending in the Eastern District of Virginia, the Southern District of New York, and in the Second and Fifth Circuit Courts of Appeal.*

The granting of a writ of certiorari is discretionary with this Court and will not be granted when there are considerations of ripeness which, in the Court's view, obviate the need for a decision at this point. *See, e.g., Singleton v. Commissioner,* 439 U.S. 940 (1978) (denial of writ);[2] *Brotherhood of Locomotive*

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2 In *Singleton v. Commissioner,* 439 U.S. 940 (1978), the Court stated:

> Moreover, in allocating the Court's scarce resources, I consider it appropriate to disfavor complicated cases which turn largely on unique facts. A series of decisions by the courts of appeals may well provide more meaningful guidance to the bar than an isolated or premature opinion of this Court. As Mr. Justice Frankfurter reminded us wise adjudication has its own time of ripening.

Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) (no certiorari because Circuit Court had remanded issue); *Parker v. Los Angeles County*, 338 U.S. 327 (1949) (no certiorari because of pending state litigation); *Continental Oil Co. v. United States*, 299 U.S. 510 (1936) (dismissal of writ).

It is Respondent's belief that the probability of further decisions from courts and/or arbitration proceedings which are now considering factual situations related to the instant case make the Court's consideration of this Petition premature at this time.[3]

2. *There is no conflict among the Circuits with respect to this case as alleged by the Petitioners; the cases cited by the Petitioners are distinguishable on the facts and/or law and are not inconsistent.*

The Petitioners allege a conflict exists between the decision of the Fifth Circuit Court of Appeals decision in *Sea-Land Services, Inc. v. International Longshoremen's Association*, 625 F.2d 38 (5th Cir. 1980), and the decision of the Fourth Circuit

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3 As of this moment, Respondent is aware of the following judicial proceedings still pending which relate to the issue of manning and utilization of container gang members under the various ILA-association collective bargaining agreements: *West Gulf Maritime Ass'n. v. ILA Deep Sea Local 24*, 751 F.2d 721 (5th Cir. 1985), *petition for reh'g en banc filed*, Jan. 21, 1985; *Hampton Roads Shipping Ass'n. v. ILA*, 597 F.Supp. 709 (E.D. Va. 1984), *aff'd in part, rev'd in part*, 746 F.2d 1018 (4th Cir. 1984), *reh'g denied*, _____F.2d _____ (4th Cir. 1984) (on remand motion to dismiss filed Feb. 26, 1985, motion for hearing on perm. injunction scheduled for Feb. 26, 1985 postponed at ILA request); *ILA v. West Gulf Maritime Ass'n.*, 84 Civ. 9080 LBS (S.D.N.Y. Feb. 19, 1985), *appeals filed*, 85 Civ. 7136 (2nd Cir. filed Mar. 1, 1985); *North Carolina Shipping Ass'n. v. Local 1426, ILA*, No. 84-80-CIV-7 (E.D.N.C. Sept. 21, 1984), *appeal pending*, No. 84-2122 (4th Cir. _____, 1984); *South Carolina Stevedores Ass'n. v. Local 1422, ILA*, No. 84-2007-8 (S.C. Sept. 11, 1984), *appeal pending*, No. 84-2189 (4th Cir. Sept. 27, 1984).

Court of Appeals in the instant case with respect to a Union's right to strike pending judicial consideration of an arbitration proceeding. In fact, no conflict exists between the cases. The courts have applied consistent legal treatment to different factual situations.

The *Sea-Land* decision upheld the right of district courts to issue injunctions precluding work stoppages during the period in which and arbitration award is being judicially challenged. The Court held that:

> [A]bsent express agreement to the contrary . . . a *Boys Market* injunction may continue in force pending judicial enforcement of the subsidiary judicial award.

625 F.2d at 42. However, the *Sea-Land* case refused to extend that finding to a collateral National Labor Relations Board proceeding which concerned statutory, not contractual, duties to arbitrate. *Id.* at 42-43.

The Fourth Circuit's decision in the instant case is a full conformity with the *Sea-Land* decision. Like the situation in *Sea-Land*, "The *Boys Market* 'exception' to Norris-LaGuardia is 'limited by the contours of the agreement between the parties.' " *Sea-Land*, 625 F.2d at 43. In the instant case, the District Court expressly found that the petitioner had a contractural obligation to arbitrate under the local agreement. Pet. App. B at 25a-26a. The Fourth Circuit also held that the contract between the parties justified a *Boys Market* injunction although the Circuit Court felt that local arbitration was unnecessary in view of the parallel arbitration under the master contract. Pet. App. A at 6a. Thus, no real conflict exists between the decisions of the Fourth and Fifth Circuits with respect to the granting of a *Boys Market* injunction.

Similarily, no conflict exists with the Fifth Circuit's decision in *West Gulf Maritime Association v. ILA Deep Sea Local 24*, 751 F.2d 721 (5th Cir. 1985). Pet. App. E at 34a. That case held that under the principle of comity, the injunction that was granted should be vacated and the case remanded for entry of an order

of stay, transfer or dismissal.[4] Pet. App. E at 56a. The Fifth Circuit did not include that a *Boys Market* injunction was improper in such a situation, but only that a decision on issuance of an injunction should be deferred to the Southern District of New York in keeping with the principle of comity. The Fifth Circuit expressly distinguished, and did not find a conflict with the Fourth Circuit's treatment, by noting that the issue of comity did not appear to have been raised in the instant case.[5] Pet. App. E at 56a.

Thus, there is no conflict between the decisions of the Circuits which warrants this Court granting certiorari in this matter.

3. ***The decision of the District Court is an interlocutory decision based on issuance of a preliminary injunction; the Petitioners have voluntarily continued the permanent injunction hearing previously scheduled by the District Court, and Petitioners' remedy, if any, more properly rests with that proceedings.***

As noted above, *supra* at p. 4, the District Court had previously scheduled a hearing on the permanent injunction for

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4 At this point, it appears that the case has not yet been remanded to the Texas District Court and no ultimate resolution of the issue has occurred. A Motion for a Rehearing *en banc* has been filed.

5 The Fourth Circuit was not presented with the comity issue. Even if such issue had been raised, it would not have been an appropriate case for the exercise of comity because the two actions did not arise under the same contract or from the same grievance or charge. The Southern District of New York was asked to enforce an "award" arising from a grievance in Galveston, Texas. The Southern District of Texas was also considering the Galveston grievance under the terms of the West Gulf Maritime Association contract. In the instant case, the Virginia District Court expressly found that the HRSA was never "charged" with a grievance under the Master Contract. Pet. App. B at 20-21a. The Fourth Circuit did not address that finding, and accordingly, the District Court's finding remains in effect. Comity will not lie when the respective courts are considering different cases.

February 25, 1985. At that time, Petitioners could have presented any evidence in support of their case to vacate the injunction. Instead, Petitioners chose to request that the matter be postponed. *See* letter from Thomas W. Gleason to Hon. Robert G. Doumar (Jan. 3, 1985); Res. App. at 1a. The District Court agreed to this request by its Order of February 6, 1985. Res. App. at 4a. Subsequently, Petitioners filed a Motion for Leave to Amend and Summary Judgment dated February 26, 1985. Res. App. at 5a. The Petitioners then requested the Motion be held in abeyance pending further judicial resolutions. Res. App. at 7a. In light of the probability of further action at the district court level, this Court may well wish to deny certiorari at this time pending further local developments. Under the terms of the District Court's continuance Order, Res. App. at 4a, further developments are anticipated before this case would be expected to come before this Court on the merits should a writ be granted.

4. ***This case does not involve important questions of national law and policy, but is a factual dispute which follows prior decisions of this Court concerning the jurisdiction of federal courts to issue labor injunctions.***

The Petitioners allege that this case involves important questions of national law and policy. As noted throughout this brief, we believe that the Fourth Circuit has consistently followed this Court's decision in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), and it progeny. What is in dispute are the factual finding of the lower courts with respect to the terms of certain local and national collective bargaining agreements and whether enforceable arbitration awards exist which give rise to or preclude to issuance of *Boys Market* labor injunctions. There is no dispute as to the applicable law.

Similarily, the Petitioners' allegations that this Court's decision is necessary to preserve uniformity in every ILA port is unfounded. The ILA and its locals have chosen to enter into different local collective bargaining agreements in every port area, *see* Pet. App. B at 23a, and the "uniformity" which they wish to preserve in various jurisdictions has never existed.

Should the ILA wish such uniformity, its proper vehicle is to resort to the bargaining table and the local collective bargaining agreements.

CONCLUSION

For the foregoing reasons, Respondent prays that this Court deny Petitioners' request for writ of certiorari in this matter.

Dated: March 13, 1985

Respectfully submitted,

VANDEVENTER, BLACK, MEREDITH & MARTIN
500 World Trade Center
Norfolk, Virginia 23510
(804) 622-4381

Of Counsel:

DANIEL R. WECKSTEIN
BRADEN VANDEVENTER

APPENDIX

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APPENDIX A
LETTER FROM THOMAS W. GLEASON

January 3, 1985

Hon. Robert G. Doumar
United States District Judge
United States District Court
Eastern District of Virginia, Norfolk Division
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Re: Hampton Roads Shipping Association v.
International Longshoremen's Association
Civil Action No. 84-500-N

Dear Judge Doumar:

We are writing at this time to advise Your Honor of certain developments in the above case which have occurred since the granting of the preliminary injunction and also to request that, in light of these developments, Your Honor postpone the pretrial conference presently scheduled for February 1, 1985.

On August 29, 1984 Judge Sand of the United States District Court for the Southern District of New York denied ILA's petition to confirm the Emergency Hearing Panel award. Judge Sand remanded the case to the EHP, to consider the effect of the "abstention" by a management member of the Panel at the time that the EHP members voted on the "18 and 2" grievance on June 12, 1984. A copy of Judge Sand's opinion, issued October 4, 1984 is enclosed. We also note that the Council of North Atlantic Shipping Associations intervened in the action before Judge Sand prior to the issuance of his decision and that Hampton Roads Shipping Association is therefore bound by Judge Sand's decision through its membership in CONASA.

LETTER FROM THOMAS W. GLEASON

Hon. Robert G. Doumar
United States District Judge
January 3, 1985
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Upon remand to the Emergency Hearing Panel, the EHP deadlocked on the question of what effect the abstention had on the proceedings of June 12. Accordingly, pursuant to Judge Sand's decision and the EHP's own procedures, the abstention question was submitted to and independent arbitrator. On December 10, 1984 Mr. Arnold Zack, the arbitrator selected by the parties, issued his decision, finding that the abstention had the effect of carrying the vote in favor of the ILA and that the June 12 EHP decision was thus a final and enforceable award. A copy of Mr. Zack's decision is also enclosed.

Finally, on December 17, 1984 the ILA commenced a new action in the United States District Court for the Southern District of New York, No. 84 Civ. 9080, seeking to renew its petition to enforce the June 12 EHP award, in light of Mr. Zack's arbitral decision. Pursuant to Judge Sand's prior order, the new action has also been assigned to Judge Sand and is scheduled for hearing on Thursday, January 10, 1985. In the new action, the ILA has named as defendants all of the employer associations which are party to the Management-ILA Master Contract, including CONASA. Accordingly, a uniform decision should eventually be issued, binding upon all the ports. A copy of ILA's petition in the new case is also enclosed.

In affirming the preliminary injunction granted by Your Honor, the Fourth Circuit ruled that the validity of the EHP award can be considered in the New York action and as a result local arbitration of this matter is unnecessary. Accordingly, there would appear to be no need to proceed to trial of this case

LETTER FROM THOMAS W. GLEASON

Hon. Robert G. Doumar
United States District Judge
January 3, 1985
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at the present time. We respectfully request that the pretrial conference presently scheduled for February 1, 1985 be postponed.

Very truly yours,

THOMAS W. GLEASON

By: Charles R. Goldburg
Charles R. Goldburg

CRG/jam

cc: Braden Vandeventer, Esq.
Arthur Rutter, Esq.

APPENDIX B
ORDER OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

HAMPTON ROADS SHIPPING ASSOCIATION,

Plaintiff,

v. CIVIL ACTION NO. 84-500-N

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL-CIO), et al,

Defendants.

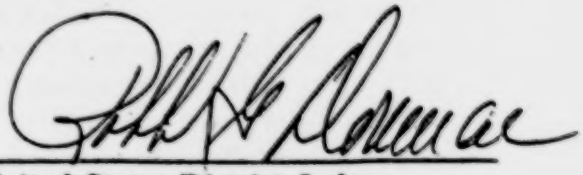
ORDER

On February 1, 1985 the parties in this matter appeared in chambers for a conference to discuss resolution of this case.

It appearing that the Southern District of New York and the Second Circuit Court of Appeals are actively considering issues interrelated with the instant matter, this Court ORDERS the parties to report July 31, 1985 on the status of the entire situation.

In any case, this matter shall be adjudicated in full by the end of this calendar year 1985, or sooner dismissed without prejudice should the parties desire.

IT IS SO ORDERED.



United States District Judge

At Norfolk, Virginia
February 6, 1985

APPENDIX C
PETITIONER'S MOTION FOR LEAVE TO AMEND AND SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

---x

HAMPTON ROADS SHIPPING ASSOCIATION,

Plaintiff,

v.

Civil Action
No. 84-500-N

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.

Defendants.

---x

MOTION FOR LEAVE TO AMEND AND SUMMARY JUDGMENT

Defendants by their attorneys, Breit, Rutter & Montagna and Thomas W. Gleason, hereby move the court for an order:

(i) pursuant to Rule 15 of the Federal Rules of Civil procedure granting defendants leave to serve an amended answer asserting the defenses of res judicata and collateral estoppel and also making certain minor revisions in the answer so as to accurately reflect subsequent events.

(ii) pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting summary judgment dismissing the complaint on the grounds of res judicata and collateral estoppel;

(iii) for such other and further relief as to the court may seem just and proper.

PETITIONER'S MOTION FOR LEAVE AMEND AND SUMMARY JUDGMENT

This motion is based upon all the exhibits annexed hereto and the accompanying memorandum of law.

Dated: February 26, 1985

BREIT, RUTTER & MONTAGNA
720 Atlantic National Bank Building
415 St. Paul's Boulevard
(804) 622-5000

Thomas W. Gleason by CRG

THOMAS W. GLEASON
90 Broad Street
Suite 600
New York, NY 10004
(212) 425-3240

Attorneys for Defendants

CERTIFICATE OF SERVICE

CHARLES R. GOLDBURG hereby certifies that on February 26, 1985 he mailed a copy of defendant's motion for leave to amend and summary judgment to Vandeventer, Black, Meredith & Martin, 500 World Trade Center, Norfolk, VA 23510, counsel for plaintiff.

Charles Goldburg

CHARLES R. GOLDBURG

APPENDIX D
LETTER FROM THOMAS W. GLEASON

February 28, 1985

FEDERAL EXPRESS

Hon. Robert G. Doumar
United States District Judge
United States District Court
Eastern District of Virginia
Norfolk Division
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Re: Hampton Roads Shipping Association v.
International Longshoremen's Association
Civil Action No. 84-500-N

Dear Judge Doumar:

I am writing to advise Your Honor that by order dated February 28, 1985, Judge Sand of the United States District Court for the Southern District of New York granted a stay of his order confirming the EHP award, pending appeal to the United States Court of Appeals for the Second Circuit by Council of North Atlantic Shipping Associations and the other appellants. The appeal to the Second Circuit is scheduled to be argued on March 18, 1985.

Accordingly, the defendants would consent that their motion for summary judgment based on res judicata be held in abeyance until a ruling by the Second Circuit on the merits of

LETTER FROM THOMAS W. GLEASON

the appeal or the vacating of the stay, should it be vacated earlier.

Very truly yours,

THOMAS W. GLEASON

By: Charles Goldburg
Charles R. Goldburg

CRG:km

cc: Braden Vandeventer, Esq.
Arthur Rutter, Esq.